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NO. 488

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

ELLEN D. BAY, ET AL., *Petitioners*

v.

JOHN W. MECOM, TRUSTEE ET AL., *Respondents*

## PETITION FOR WRITS OF CERTIORARI

**To The Supreme Court Of The State Of Texas:**
**The Beaumont, Texas Court Of Civil Appeals:**
**The Eastland, Texas Court Of Civil Appeals:**
**And The District Court Of Liberty County, Texas**

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NO._____

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ELLEN D. BAY, ET AL., *Petitioners*

v.

JOHN W. MECOM, TRUSTEE ET AL., *Respondents*

## PETITION FOR WRITS OF CERTIORARI

**To The Supreme Court Of The State Of Texas: The Beaumont, Texas Court Of Civil Appeals: The Eastland, Texas Court Of Civil Appeals: And The District Court Of Liberty County, Texas**

Overton B. Banks on behalf of Ellen D. Bay, Overton B. Banks, W. F. Hooks and Pearl Chesnutt McCoy prays that writs of certiorari issue to review judgments of the Supreme Court of Texas; the Beaumont, Texas Court of Civil Appeals; the Eastland, Texas Court of Civil Appeals and the District Court of Liberty County, Texas.

## OPINIONS BELOW

The judgment of the District Court of Liberty County, Texas entered October 11, 1962 (R1, Pages 239-241, Appendix A, Pages 1-4) is recorded in Vol. 20, Page 571, Civil Minutes, District Court of Liberty County Texas is unreported, but was affirmed by the Eastland Court of Civil Appeals by judgment entered December 16, 1966 with opinion reported in 410 S.W.2d 300 (R42, Appendix A, Pages 21-26) Writ Refused by the Supreme Court of Texas, No Reversible Error, Motion for Rehearing overruled May 17, 1967 by the Supreme Court of Texas (R47, Appendix A, Page 30).

The opinion of the Beaumont Court of Civil Appeals entered January 7, 1965 (R24, Appendix A, Pages 5-10) is reported in 387 S.W.2d 482, Motion for Rehearing Overruled February 17, 1965 (R25, Appendix A, Page 11). The Supreme Court of Texas granted writ of Error (R24, Appendix A, Page 12) and the opinion of the Supreme Court of Texas entered July 21, 1965 (R25, Appendix A, Pages 14-18) affirming the dismissal of Ellen D. Bay and Sun Oil Company but remanding the cause of Banks and Hooks against John W. Mecom, Trustee; Carnes W. Weaver and Freeport Sulphur Company to the Beaumont Court of Civil Appeals for a decision on the merits is reported in 393 S.W.2d 819. Motions for Rehearing were overruled without opinion October 6, 1965 (Appendix A, Page 18).

By order of the Supreme Court of Texas dated October 3, 1966 (R38, Appendix A, Pages 19-20) the Banks and Hooks case was transferred to the Eastland Court of Civil Appeals and the opinion of the Eastland Court of Civil Appeals entered December 16, 1966 (R42, Appendix A, Pages 21-27) is reported in 410 S.W.2d 300, Motion for

Rehearing Overruled January 13, 1967, (R44, Appendix A, Page 28). Application for Writ of Error to the Supreme Court of Texas was refused, the Court having determined that the application presented no error requiring reversal of the Judgment of the Court of Civil Appeals, and Motion for Rehearing of said Application for Writ of error was overruled May 17, 1967 (R47, Appendix A, Page 25).

## JURISDICTION

In their Motion for Rehearing Overruled by judgment of the Supreme Court of Texas on May 17, 1967, Bank and Hooks specially set up or claimed that the parties to the Bay lease contracted with reference to the oil and gas conservation laws of Texas, including the Interstate Compact for the Conservation of Oil and Gas (Article 6008-1, V.T.C.S.) thereby invoking jurisdiction of this court under 28 U.S. Code 1257(3) as settled by Delaware River Joint Toll Bridge Commission v. Colburn, 310 U.S. 419, to review this case on writ of certiorari.

## QUESTIONS PRESENTED

1. Whether the unit designation executed by John W. Mecom, Trustee on December 29, 1954 created a pooled unit for the conservation of oil and gas.
2. Whether the Railroad Commission of Texas has the exclusive primary jurisdiction and power to enforce the oil and gas conservation laws of Texas, Article 6004 through 6066d, Title 102, Oil and Gas, Vernon's Texas Civil Statutes and the rules and regulations of the commission thereunder for the conservation and development of the oil and gas natural resources, the proration of production to

market demand and the payment without unreasonable delay for purchases of oil and gas by common purchasers.

3. Whether in the absence of power of the compacting states to make and enforce laws with stringent penalties for violations, for the payment without unreasonable delay for oil and gas purchases can the Interstate Compact for the Conservation of oil and gas accomplish the objective of the parties thereto.

4. Whether oil produced from the Bay well and delivered to Sun Oil Company was personal property of the several owners thereof protected from confiscation with respect to the contractual price or true value thereof, by both the Fifth and Fourteenth Amendments to the Constitution of the United States.

5. Whether the covenant running with the land obligating the operators of the Bay well to use utmost good faith and fair dealing in matters affecting the accrual and payment for royalty and overriding royalty oil was discharged by delivery of the oil to Sun Oil Company.

6. Whether Sun Oil Company was and is now under a non-delegable duty to make prompt payment for oil purchased from the Bay well.

7. Whether Respondents John W. Mecom, Trustee, Carnes W. Weaver, Freeport Sulphur Company and Sun Oil Company are in violation, subject to penalties, of the no-spacing, per well proration rules of the Railroad Commission of Texas for the Hull piercement type salt dome Field of Liberty County, Texas as a result of continuous repre-

sentations as shown on Division order No. 4144 that the unit designation executed by John W. Mecom, Trustee created a pooled unit for the conservation of oil and gas.

8. Whether in the absence of penalties assessed against the above named Respondents, for violation of the conservation laws of Texas, adequate compensation can be made to the owners of royalty and overriding royalty oil allocated interests as shown on Sun Oil Company Division Order No. 4144, for damages suffered.

9. What was the true intention of the parties to the Bay lease with respect to the exercise at the pooling power?

10. Whether this case is of such imperative public importance as to justify deviation from normal appellate processes and to require immediate settlement in this court.

## STATEMENT

In March 1955, Respondents John W. Mecom, Trustee; Carnes W. Weaver and Freeport Sulphur Company as operators, completed an oil well in the Hull piercement type salt dome field of Liberty County, Texas, on a .774 acre tract under which Ellen D. Bay owned the land owners 1/8th royalty and Banks and Hooks owned 1/8th overriding royalty. Commencing in April 1955 and continuing through August 1962, Respondents Sun Oil Company received oil produced by said well at the outlet of the tank battery under its Division Order No. 4144, of the value of $288,637.80 but has withheld payment of all of such oil except the sum of $1404.53 released to Ellen D.

Bay after her 1960 settlement, leaving a balance of $287,-233.27 which Sun Oil Company paid into the registry of the District Court of Liberty County, Texas in October 1962 with its "Amended Interpleader of the Defendant Sun Oil Company" alleging status of mere stakeholder with right to have the court resolve conflicting claims and distribute the fund.

Apparently the alleged conflicting claims are the result of the execution of a unit designation by John W. Mecom, Trustee on December 29, 1954 purporting to pool the Bay .774 acre tract with other lands under lease to Respondent Operators within a bounded area of about 23 acres in the Hull piercement type salt dome field, the exact acreage under lease to said operators within such bounded area has never been definitely ascertained. The operators claimed that said unit designation created a pooled unit for the conservation of oil and gas and constituted a good faith exercise of the pooling authority of the Bay lease which authorized the pooling of the Bay tract with other lands in the immediate vicinity thereof

> "when in Lessee's judgment it is necessary or advisable to do so in order properly to develop and operate said leased premises in compliance with the spacing rules of the Railroad Commission of Texas, or other lawful authority, or when to do so would, in the judgment of Lessee, promote the conservation of oil and gas from said premises. Units pooled for oil hereunder shall not substantially exceed 40 acres each in area, and units pooled for gas hereunder shall not substantially exceed in area 640 acres each plus a tolerance of 10% thereof."

The rules of the Railroad Commission of Texas for the Hull Field include no-spacing and per well or 100% well

factor, no acreage factor, proration, and it is therefore impossible to "create" a pooled unit for the conservation of oil and gas in said Hull Field. However, Respondent operators continuously represented that said unit designation created a pooled unit for the conservation of oil and gas, and in October, 1956 Respondent Sun Oil Company issued its Division Order No. 4144 representing legal effect for said unit designation and more than 96% reduction in the royalty and overriding royalty interests of Bay, Banks and Hooks in the oil production from the Bay well, and although said Division Order was cancellable on notice it was maintained in full force and effect from the date of first oil runs in April 1955 through August 1962.

Suits were instituted by Ellen D. Bay and Banks and Hooks in December 1956 for the collection of money accruals to their 1/8th royalty and 1/8th overriding royalty respectively. However adjudication of said suits was actively opposed by Sun Oil Company and Respondent Operators.

In the early part of 1960 Ellen D. Bay became ill and in need of funds so on her instructions her then attorneys made a settlement with the Respondent operators for $10,000 when at the time more than $30,000 had accrued to her 1/8th royalty, and she signed Sun Oil Company Division Order No. 4144, and $1404.53 was paid to her under the terms of said division order.

In the latter part of 1960 came on for trial the cause of Banks and Hooks and after about a week of trial before a jury the question was raised that all necessary parties were not before the Court so the trial was discontinued and case continued on the docket undecided.

In the early part of 1961 Banks and Hooks reached the conclusion that the unit designation was a nullity so they filed Motion for Summary Judgment on sworn account, raising question of physical waste and violation of conservation laws. A hearing was had on June 23, 1961 as a result of which Banks and Hooks were put under a stay order not to continue proceedings against Sun until after the question as to the nullity of the unit designation had been decided, the opposition taking the position that all parties named by Sun Oil Company were necessary parties to any consideration by the court as to the nullity of the unit designation.

During the latter part of 1961 and the early part of 1962 Banks and Hooks perfected their pleadings and Ellen D. Bay filed petitions offering to do equity and requesting amounts accrued to her 1/8th royalty less amounts received in her settlement. In October and November 1962 all issues were before the trial court on Motions for Summary Judgment by Bay, Banks and Hooks and Respondent operators and Sun Oil Company, as a result of which the Court dismissed Ellen D. Bay, overruled the Motions of Bay, Banks and Hooks for Summary Judgment, but granted Motion of Respondent Operators for summary judgment finding creation of a pooled unit by the mere execution of the unit designation by John W. Mecom, Trustee on December 29, 1954, and granted Motion of Sun Oil Company for summary take-nothing judgment against Ellen D. Bay.

An appeal limited to the claims of Bay, Banks and Hooks against John W. Mecom, Trustee; Carnes W. Weaver, Freeport Sulphur Company, Sinclair Oil & Gas Company and Sun Oil Company was taken to the Beaumont Court of Civil Appeals and after oral argument on

April 4, 1963 their appeals were dismissed on January 7, 1965 and motion for rehearing overruled on February 17, 1965. The Supreme Court of Texas granted Writ of Error and in decision of July 21, 1965 affirmed the dismissal of Ellen D. Bay, severed out and dismissed Sun Oil Company but referred the cause of action of Banks and Hooks against the operators to the Beaumont Court of Civil Appeals for a decision on the merits. Motions for rehearing were overruled on October 6, 1965.

In October 1966 the Banks and Hooks cause was transferred to the Eastland Court of Civil Appeals and decision entered December 16, 1966 and Motion for Rehearing Overruled January 13, 1967. The Supreme Court of Texas refused Writ of Error on April 12, 1967 and overruled Motion for Rehearing on May 17, 1967.

The voluminous record of this case and its 10 year repose in the Texas Courts stands as documentary evidence of the interminable confusion and hardship resulting to royalty and overriding royalty owners from collateral attack on an order of the Railroad Commission of Texas prorating the Bay well on a per well basis or 100% well factor no acreage factor basis which collateral attack made in the District Court of Liberty County, Texas has been sanctioned by the Beaumont Court of Civil Appeals, by the Eastland Court of Civil Appeals and by the Supreme Court of Texas.

The case of Banks and Hooks has been before the appellate courts of Texas on Motions for Summary judgment by Petitioners and Respondents with the net result that after more than four years the Supreme Court of Texas affirmed the October 11, 1962 decision of the trial court by overruling on *May 17, 1967* the motion of Banks and Hooks for rehearing on their Application for

writ of error to review the December 16, 1966 decision of the Eastland Court of Civil Appeals. The Supreme Court of Texas has *twice* sanctioned the collateral attack on the order of the Railroad Commission of Texas prorating the Bay well on a per well basis by its Decision of *July 21, 1965* dismissing the appeal of Ellen D. Bay and severing out and dismissing Sun Oil Company and its *May 17, 1967* order overruling the motion of Banks and Hooks for Rehearing. And the Supreme Court of Texas having had the complete trial court record before it *twice* completely disregarded its duty under its own promulgated Rules of Civil Procedure, particularly Rules 1, 166-A and 185, to render a decision on the merits of Petitioners case, and in actual violation of Article 1986 V.A.T.C.S. and its own Rule 163 severed out and dismissed Sun Oil Company, the principal obligor and only indispensable party to the suits of Bay, Banks and Hooks for the value of their royalty and overriding royalty oil.

The claim of Petitioner Pearl Chesnutt McCoy has not been considered by the trial court as her petition in response to the "Amended Interpleader of Defendant Sun Oil Company" was filed November 5, 1962 after entry of the final judgment of October 11, 1962. However, land owned by Mrs. McCoy is shown on Sun Oil Company Division Order No. 4144 as follows:

| | | |
|---|---|---|
| SUSPENSE | | |
| Lots 1 & 2, Block 1; Lots 24, 25, 26,) & 27, Block 5; Lots 31 and 32, Block) 7; and Lots 10, 11 & 12, Block 11,) Chesnutt Addition, Hull Townsite ) | .081613 | WI ORI & RI |

She executed a lease to John W. Mecom and has been anticipating payments. Title to her land has been clouded

by the unit designation and as a result of the pooling claims of Respondents she has had no opportunity to lease the lots to others. In absence of a valid lease, she should be legally entitled to all of the .081613 interest in the $288,637.80 total value of oil produced from the Bay well.

Respondents John W. Mecom, Trustee, Carnes W. Weaver, Freeport Sulphur Company and Sun Oil Company should be liable in penalties for violations of the oil and gas conservation laws of Texas Articles 6004 through 6066d, Title 102 Oil and Gas including the interstate compact for the conservation of oil and gas, Article 6008-1, to all owners of royalty and overriding royalty interests in the production from the Bay well, because by their unlawful pooling claims the named Respondents have prevented the drilling of wells on the separately owned tracts under lease to Respondent Operators on December 29, 1954 within the bounded area described in said unit designation resulting in physical waste in the loss of such oil and gas as might otherwise have been discovered and produced by drilling in conformity with the no-spacing per well proration rules of the Railroad Commission of Texas for the Hull piercement type salt dome field. The paltry sums to which they are legally entitled, without interest, under Sun Oil Company Division Order No. 4144, can in no wise approach compensation for lost bonuses for execution of leases and the possibility of the discovery of production since December 1954 on each of the separately owned tracts. Any just compensation for damages suffered by such royalty and overriding royalty owners for the denial of the right to drill on their separately owned tracts could only come from penalties provided in Articles 6036, 6047, and 6049c, Vernon's Texas Civil Statutes.

Sun Oil Company should also be liable in penalties under Article 6049a Sections 11 and 11g for unreasonable delay in payments to the royalty and overriding royalty owners who freely and voluntarily executed Sun Oil Company Division Order 4144.

Our Texas Courts are without any primary jurisdiction whatsoever to make a determination of good faith or lawful pooling of lands to promote conservation of oil and gas therefrom, as such pooling is controlled by Article 6008b Vernon's Texas Civil Statutes which provides that any such pooling agreements shall not become lawful nor effective until the Railroad Commission of Texas finds, after application, notice and hearing, that such agreement is necessary to accomplish the purposes specified is in the interest of the public welfare as being reasonably necessary to prevent waste, and to promote conservation of oil or gas or both, and that *the rights of the owners of all interests in the field, whether signers of the unit agreement or not, would be protected under its operation*; but the Supreme Court of Texas has completely ignored this Statute and has sanctioned the actions of the District Court of Liberty County, Texas, the Beaumont Court of Civil Appeals, and the Eastland Court of Civil Appeals in finding that the unit designation executed by John W. Mecom, Trustee on December 29, 1954 created a pooled unit for the conservation of oil and gas, thereby thwarting the will of the people of Texas who placed the conservation and development of their oil and gas natural resources in the hands of their legislature (Article XVI, Sec. 59a Constitution of Texas) who have enacted adequate laws and placed the administration thereof in the hands of the Railroad Commission of Texas who have promulgated complete regulations in harmony with state and federal constitutions, both statewide and for specific

reservoirs for the conservation and development of the oil and gas natural resources, the proration of production to market demand and the prompt payment to the owners for production marketed.

In their administration of the oil and gas conservation laws of Texas, the Railroad Commission is considered agent of the people of Texas acting by and through their legislature. Under the separation of Powers provision, Article II, Section I of the Constitution of Texas which provides for separation of the powers of government into the three departments of Executive, Legislative and Judicial with prohibition against exercise by persons of one department of powers properly attached to either of the other two, the people of Texas intended that their Railroad Commission should be free to administer the oil and gas conservation laws without interference by the courts, except where an appeal is taken as provided by the Statutes. But the Supreme Court of Texas as demonstrated in its overruling on May 17, 1967 of the Banks and Hooks Motion for Rehearing has ignored its complete lack of jurisdiction although such lack of jurisdiction was raised in said Motion for Rehearing.

It is a matter of common knowledge in the oil country that oil and gas discoveries are in direct ratio to the number of wells drilled, whether drilled on small or large tracts, but as a direct result of the action of the Supreme Court of Texas in either actually invading the jurisdiction of the Railroad Commission, or by sanctioning such an invasion by collateral attacks on Railroad Commission orders in the guise of "intention of the parties with respect to the exercise of a pooling power" as is demonstrated by the record in this cause, drilling in Texas has been greatly reduced; owners of royalty and overriding royalty in-

terests in valuable oil production have seen their oil and gas royalty and overriding royalty interests confiscated by simulated combinations with non-productive acreage as in the instant case. Investors are now loathe to risk investment in Texas oil drilling ventures. In fact since the 1961 decision of our Supreme Court in the Normanna case (*Atlantic Refining Company v. Railroad Commission*, 346 S.W.2d 801) which held that a small tract owner was entitled to recover only the oil and gas in place under his small tract, a complete source of investment dollars from high income individuals who theretofore were eager to invest in the drilling of inside or proven small tract locations, because of favorable income tax treatment, has completely dried up as no such investor wants to get involved in a legal mess such as is demonstrated by the record of this case.

Oil and Gas in the ground tapped by wells producible as and when needed is to the owners, the equivalent of money in the bank. When produced, the oil and gas becomes personal property and is transported in channels of commerce. Payment is customarily made by the common purchasers for oil purchased during a month before the end of the succeeding month and the owners usually short of cash necessary to meet payrolls, bank loans and other expenses, expect and rely on regular payments, in default of which, many are thrown into bankruptcy by their creditors.

Ellen D. Bay was an elderly widow in 1955 and if she had received prompt payment of her legally owned royalties, life would have been much easier for her. Banks and Hooks were small operators in 1955 and if cash belonging to them but confiscated by Sun Oil Company had been timely paid, they could have very well have developed oil and gas production and contributed materially to the oil

and gas reserves of the nation, but now they are both over 60 years of age and that opportunity has been lost. Pearl Chesnutt McCoy is an elderly widow who has been hospitalized and prompt payment of her royalties would undoubtedly have made life easier for her.

The oil and gas producing industry in Texas has been so stifled and throttled by the usurpation by the Texas Courts of powers properly attached to the Railroad Commission, that only action by this Honorable Court can save our oil and gas producing industry by recognizing the constitutional right of an owner to the oil and gas fruits recovered from his land which oil and gas fruits taken but unpaid for are for all practical purposes stolen and converted.

Since approximately one-half of the oil and gas reserves of the United States lie within the State of Texas, this case presents constitutional issues of grave national concern, as the demand for oil and gas is increasing and unless our Texas oil and gas producing industry is freed to operate in accordance with the law of supply and demand and the constitutional rights of individuals, grave shortages of domestic oil and gas will inevitably result and the United States which rode to victory in two world wars on a sea of oil, could very well be sunk in a sea of enemy oil in another world war.

## REASONS FOR GRANTING THE WRIT

1. Examine Record of this case and Appendix "B"
2. See 45 Harvard Law Review 557-565 "The Constitutionality of the Oklahoma Oil Proration Orders"
3. Appendix "C" Statements prepared by Petitioner Banks in 1961.

## QUESTIONS RAISED ON MOTION FOR REHEARING IN THE SUPREME COURT OF TEXAS

In said Motion for Rehearing overruled May 17, 1967, by the Supreme Court of Texas, Petitioners raised the questions of

1. Void Judgments of the District Court and Court of Civil Appeals for want of jurisdiction.
2. Violation by the courts of Article II, Section 1 of the Constitution of Texas which provides for separation of the powers of government into the three departments of Legislative, Executive and Judicial with prohibition against exercise by persons of one department of powers properly attached to the other two, except where specially permitted.
3. Unlawful collateral attack on the order of the Railroad Commission of Texas prorating the Bay well on a per well basis.
4. Disregard by the Court of Civil Appeals of the provisions of both the Constitutions of the United States and of the State of Texas which prohibit the taking of Petitioners' property without due process of law.
5. Disregard by the Court of Civil Appeals of its duty under Rule 166-A of the Texas Rules of Civil Procedure to consider the points raised by Petitioners in their briefs, pleadings and affidavits supporting their Motion for Summary Judgment.
6. Disregard by the Court of Civil Appeals of the covenant of good faith and fair dealing on the part

of Respondents in all matters pertaining to Petitioners overriding royalty.

7. Disregard by the Court of Civil Appeals of the provisions of Article XVI, Sec. 59a of the Constitution of Texas which declared the conservation and development of the natural resources to be public rights and duties and directed the Legislature to make laws pursuant to which the Oil and Gas Conservation laws were enacted designating the Railroad Commission of Texas as *fact finding*, rule making and enforcement agency.

8. Action of the Court of Civil Appeals in condoning violations by Respondents of the rules and regulations of the Railroad Commission of Texas in representing good faith pooling to promote conservation of oil and gas in the Hull Piercement Type Salt Dome Field wherein wells are prorated on a per well basis.

9. Intention of the parties to the Bay lease to contract with reference the interstate compact (Article 6008-1 V.T.C.S.) whereby a number of States, including Texas, have agreed to make and enforce, with stringent penalties for violations, laws for the conservation of oil and gas by the prevention of physical waste including physical waste or ultimate loss of oil and gas arising out of the improper spacing of wells, with compliance by Lessee in a specific operation being evidenced by an order of the Railroad Commission, and that the good faith of the Lessee in the matter of pooling acreage to comply with spacing and unit rules, or to promote conservation is evidenced by an order of the Commission with respect to each separate pool-

ing, and that the parties to the Bay lease intended that the pooling power should be exercisable at any time and from time to time to bring acreage combinations into conformity with applicable unit and pooling rules.

10. That the decision of the Court of Civil Appeals if allowed to stand would place the State of Texas in violation of the Interstate Compact (Art. 6008-1 V.T.C.S.)

WHEREFORE Petitioners respectfully pray that the Honorable Supreme Court of the United States take jurisdiction of this case, appoint a special master to ascertain necessary facts and make recommendations, decide all issues of law, distribute the $287,233.27 fund to the legal owners thereof, and grant such penalty and other relief to which each and every royalty and overriding royalty owner party to this case may be justly entitled, either at law or in equity.

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## CERTIFICATE OF SERVICE

I hereby certify that I have this _____ day of August, 1967 served a copy of the foregoing Application for Writs of Certiorari on each of the following attorneys by depositing the same in a United States post office or mail box with postage prepaid addressed as follows:

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OVERTON B. BANKS

## APPENDIX A

NO. 16695

ELLEN D. BAY
VS.
JOHN W. MECOM, ET AL

IN THE DISTRICT COURT OF
LIBERTY COUNTY, TEXAS
75TH JUDICIAL DISTRICT

### JUDGMENT

BE IT REMEMBERED on this the 28th day of September, 1962, came on to be heard in its regular order and setting in this cause the motion of the defendants, John W. Mecom, Trustee, Carnes W. Weaver and Freeport Sulphur Company, for summary judgment in said defendants' favor on the cross-action of cross-plaintiffs, Overton B. Banks and W. F. Hooks, and thereupon both cross-plaintiffs and said defendants appeared in open court and announced ready on the hearing on said motion, and the Court, on hearing the motion, evidence and argument of counsel in connection therewith and being fully advised, is of the opinion and so finds that said defendants' Motion for Summary Judgment should be granted. It appeared to the Court from said evidence, affidavits, pleadings and admissions on file that no genuine issue as to any material fact exists in this cause and that said defendants are entitled to a judgment as a matter of law.

It further appears to the Court that all issues existing between plaintiff, Ellen D. Bay, and said defendants have been severed out of this cause and docketed in a separate cause styled Ellen D. Bay vs. John W. Mecom, et al, No.

16,965-B upon the docket of this court and all issues between said plaintiff and said defendants have been determined in said severed cause and the petition of Ellen D. Bay and Ellen D. Bay has been dismissed from this case.

The Court further finds from the hearing of said motion that the "JOHN W. MECOM, TRUSTEE-ELLEN BAY ET AL UNIT" as created by Unit Designation dated December 29, 1954, recorded in Vol. 414, page 220, of the Deed Records of Liberty County, Texas, which records are here referred to, is a valid unit and in full force and effect embracing the leases described in said unit designation recorded in said Vol. 414, page 220, of the Deed Records of Liberty County, Texas, which is in full force and effect.

The Court further finds that all actions for accounting for minerals produced from the well described in the pleadings of the parties which is located on said unit and from said unit have been severed from this cause into cause No. 16,695-A to be determined in said severed cause after the validity of said unit is established in this case and said unit is declared to be valid.

It is, therefore, ORDERED, ADJUDGED and DECREED that the Motion for Summary Judgment of defendants, John W. Mecom, Trustee, Carnes W. Weaver and Freeport Sulphur Company, be and is hereby sustained and that all relief sought by cross-plaintiffs, Overton B. Banks and W. F. Hooks, be and is hereby denied and that said cross-plaintiffs take nothing in this suit of and from said defendants, and that the "JOHN W. MECOM, TRUSTEE-ELLEN BAY ET AL UNIT" as created by the Unit Designation dated Decem-

ber 29, 1954, recorded in Vol. 414, page 220, of the Deed Records of Liberty County, Texas, which records are here referred to, is declared to be a valid unit and in full force and effect. This judgment is without prejudice to the right of cross-plaintiffs, Overton B. Banks and W. F. Hooks, to secure an accounting in severed cause No. 16,695-A for a royalty interest in the unit in lieu of and instead of the one-eighth (1/8th) overriding royalty reserved by said cross-plaintiffs in their assignment of the Ellen D. Bay lease to John W. Mecom by assignment recorded in Vol. 414, page 211, of the Deed Records of Liberty County, Texas, said overriding royalty interest on said pooled production amounting to only such portion of said one-eighth (1/8th) overriding royalty reserved by cross-plaintiffs as the amount of acreage (surface acres) covered by said Ellen D. Bay lease, recorded in Vol. 325, page 302, of the Deed Records of Liberty County, Texas, and which is included in the unit, on an acreage basis bears to the total acreage (surface acres) so pooled in said unit. Cross-plaintiffs' claim to a full one-eighth (1/8th) overriding royalty is denied and cross-plaintiffs' rights in said accounting shall be limited to their proportion of production on the basis that said unit designation of the "JOHN W. MECOM, TRUSTEE-ELLEN BAY ET AL UNIT" is valid and effective.

It is further ORDERED, ADJUDGED and DECREED that all relief sought by any party to this suit not expressly granted or denied in this judgment and not embraced in said severed cause No. 16,695-A above referred to be and is hereby dismissed from this cause.

It is further ORDERED that the costs of this suit be and are hereby taxed against the parties to this suit by which respectively incurred, for which let execution issue.

To all of which cross-plaintiffs, Overton B. Banks and W. F. Hooks, in open court duly excepted and gave notice of appeal to the Court of Civil Appeals for the Ninth Supreme Judicial District at Beaumont, Texas.

ENTERED this 11th day of October, 1962.

/s/ P. C. MATTHEWS
JUDGE

APPROVED AS TO FORM:

/s/ OVERTON B. BANKS
Attorney for Cross-Plaintiffs

/s/ C. B. CAIN

FOUTS, MOORE, WILLIAMS & CALDWELL

By /s/ Joseph M. Moore.
Attorneys for Defendants.

Recorded Vol. 20, page 571
Civil Minutes, District Court
Liberty, Texas.

IN THE COURT OF CIVIL APPEALS
FOR THE
NINTH SUPREME JUDICIAL DISTRICT OF TEXAS
At Beaumont, Texas

NO. 6624

ELLEN D. BAY, ET AL, APPELLANTS,

V.

JOHN W. MECOM, TRUSTEE, ET AL, APPELLEES.

We dispose of this appeal by sustaining all appellees' motions to dismiss same.

The following history of the controversy and the procedural matters arising in the same between the parties in the trial court are largely as outlined in the appellees' motions to dismiss:

Ellen D. Bay originated Suit No. 16695, being the sole plaintiff therein, and naming initially as defendants John W. Mecom, Overton B. Banks, Sun Oil Company, and others. The controversy then as initiated by Ellen D. Bay and as was continued by Overton B. Banks and W. F. Hooks as cross-plaintiffs after Ellen D. Bay settled and had judgment entered disposing of her claims centered around the validity of a unit designation executed by John W. Mecom, Trustee, on December 29, 1954, and recorded in the deed records of Liberty County, Texas. Sun Oil Company answered the original Ellen D. Bay suit by motion to stay, abate and dismiss and by interpleader setting forth that it was the purchaser of oil and as such a mere stakeholder not interested in the subject matter of the suit other than to pay the money in dispute to the

persons justly entitled to receive it and making tender of the funds accruing from its purchases.

The trial court at an early date took note of the fact that the real controversy arose over the validity of the unit designation and that the Sun Oil Company was a mere stakeholder and not concerned with such controversy. Under date of November 13, 1959, therefore, the court entered an order acknowledging the interpleader position of Sun Oil Company and severing the action against Sun Oil Company into separate suit given the number 16695-A to be heard and determined "after the validity of said unit and the other matters involved in this suit are disposed of." When pleadings were still filed against Sun Oil Company (although the claims against it had thus been severed from the main suit), the court on July 21, 1961, entered another order again recognizing the position of the Sun Oil Company as a stakeholder who had filed an interpleader action and again ordered that all proceedings against Sun Oil Company be stayed until the determination of the main action.

Prior to the entry of the order on July 21, 1961, staying proceedings against the Sun Oil Company, Ellen D. Bay, the original plaintiff, who had brought the suit contesting the validity of the unit designation, through her then attorneys, entered into a compromise and settlement, which was consummated by the entry of final judgments disposing of her suits in both the original and the severed actions. She released John W. Mecom, Trustee, and the other defendants who had been named in the main suit and ratified the unit designation. Her suit was severed from the cross-action which was being prosecuted by Overton B. Banks and W F. Hooks as cross-plaintiffs, in which they themselves then and now contest the validity of the

unit. The severed action of Bay v. Mecom, et al, was assigned No. 16695-B and final judgment entered on March 22, 1960, in such severed action disposing of the suit of Ellen D. Bay against John W. Mecom, John W. Mecom, Trustee, Carnes W. Weaver, Freeport Sulphur Company and Sinclair Oil Company.

While this disposed of the original action of Ellen D. Bay against the main defendants, this still left her severed action 16695-A against Sun Oil Company (in which Sun had filed interpleader) pending. In order to dispose of that action Ellen D. Bay filed a motion to dismiss the suit against Sun Oil Company with prejudice and on June 1, 1960, the court entered the order dismissing the Bay suit against Sun Oil Company with prejudice and ordering Sun Oil Company to pay to Ellen D. Bay her royalty interest under the unit as recognized and ratified.

Thus, insofar as Ellen D. Bay and the Sun Oil Company were concerned, the litigation had terminated with the entry of such judgment on June 1, 1960.

At this stage of the proceedings all claims against Sun Oil Company including the cross-action of Overton B. Banks and W. F. Hooks remained severed from the main action and assigned No. 16695-A. The position of Sun Oil Company under their interpleader had been recognized and all proceedings against Sun Oil Company had been stayed until the determination of the main action No. 16695 wherein Overton B. Banks and W. F. Hooks, as cross-plaintiffs, still contested the unit designation and no final judgment has yet been entered in this severed action 16695-A.

It was at this point that Ellen D. Bay, who had departed from the scene by entry of the judgments on November

22, 1960 and June 1, 1960 re-appeared by the institution of a new suit against Sun Oil Company, which for some unexplained reason bore the No. 16695-A.

Citation was served on Sun Oil Company and they answered by pleading the prior disposition of the case by compromise, ratification of the unit and the actual payment to Ellen D. Bay by Sun Oil Company, and acceptance by her, of the payments made pursuant to such compromise.

Contending that as a matter of law there were no allegations made in this second suit by Ellen D. Bay giving her the right to any of the relief sought (which would involve setting aside her compromise and the prior judgments) and that by reason of the undisputed matters shown of record she was not entitled to any relief, Sun Oil Company filed its motion for summary judgment against Ellen D. Bay. The motion for summary judgment was sustained and judgment entered in favor of Sun Oil Company and against Ellen D. Bay on November 5, 1962. As shown by appellee's motion to dismiss the Ellen D. Bay appeal against Sun Oil Company, there has been no bond, affidavit or deposit filed to appeal from this judgment.

Overton B. Banks and W. F. Hooks in No. 16695-A had filed on October 16, 1962, a motion for summary judgment against Sun Oil Company. Whether this motion was in the old proceeding so numbered or in the new Bay suit is uncertain but it must be held that it was filed in the old suit as they never sought or obtained leave to become parties in the new suit brought by Ellen D. Bay. Ellen D. Bay had likewise filed in her suit a motion for summary judgment. The court denied the motion for summary judgment filed by Bay, Banks and Hooks.

Appellants' briefs intermingle and confuse the two suits and proceedings. Banks and Hooks were not parties to the new suit No. 16695-A and never perfected any appeal from the judgment in such case entered November 5, 1962. The appellant, Ellen D. Bay, against whom a final judgment was entered never perfected her appeal against Sun Oil Company by filing bond or deposit.

The briefs of the appellants do not distinguish between the two suits and are most confusing by points which intermingle their contentions in the separate suits. We sustain the motions of all appellees to dismiss the appeals of all appellants, first, because it is obvious that said appellants have attempted to prosecute appeals from two separate judgments in two separate proceedings under one appeal and one transcript. This is not to be condoned. Missouri, K. & T. Ry. Co. of Texas v. Davison, 55 S.W. 188; Mohr v. Cochran, 49 S.W. 677. Banks and Hooks are appealing from the judgment rendered in favor of Mecom, et al, in Cause No. 16695 and Ellen D. Bay is appealing from the order dismissing her from said suit. In Cause No. 16695-A, Ellen D. Bay is appealing from the judgment rendered against her and in behalf of Sun Oil Company.

Second, in her suit against Sun, Ellen D. Bay has failed to file an appeal bond or costs in lieu thereof. Moreover, in connection with appellants Banks and Hooks' attempted appeal in the suit with appellant Bay against Sun, we have observed that they have no position in the case. They were not parties to the suit or judgment, Bay being the sole plaintiff against Sun, the sole defendant. Even had they been parties to the judgment they, as Bay, never did perfect an appeal by filing bond, affidavit or deposit. The only thing shown in the transcript in this respect is the acknowledgment of deposit in lieu of costs by Bay, Banks

and Hooks in Cause No. 16695. This acknowledgment in lieu of costs in No. 16695 in a judgment between Banks and Hooks v. Mecom, Freeport and Weaver can have no application to the judgment between Bay and Sun.

The motions of all appellees herein to dismiss the appeals of all appellants herein are accordingly sustained and said appeals are ordered dismissed.

L. B. HIGHTOWER
L. B. Hightower,
Chief Justice

Parker, Assoc.J., disqualified and took no part in the decision of the Court.

STATE OF TEXAS
COUNTY OF JEFFERSON

I, Elizabeth LeBlanc, Clerk of the Court of Civil Appeals, for the Ninth Supreme Judicial District of Texas, at Beaumont, Texas, do hereby certify that the foregoing 5 pages, is a true and correct copy of OPINION in cause No. 6624 ELLEN D. BAY, ET AL vs. JOHN W. MECOM, TRUSTEE, ET AL which was filed in said Court of Civil Appeals on the 7th day of January, A. D. 1965.

Witness my hand and seal of said Court of Civil Appeals, at Beaumont, Texas, this 26 day of May, A. D. 1967.

ELIZABETH LEBLANC, Clerk
By /s/ Elizabeth LeBlanc

(Seal)

COURT OF CIVIL APPEALS
NINTH SUPREME JUDICIAL DISTRICT
BEAUMONT, TEXAS

February 17, 1965

No. 6624 Ellen D. Bay, et al. vs.
John W. Mecom, et al.

Hon. Overton B. Banks
Houston, Texas

Messrs. Fouts, Moore, Williams & Caldwell
Houston, Texas

Messrs. Orgain, Bell & Tucker
Beaumont, Texas

Hon. J. L. LyBrand
Beaumont, Texas

Gentlemen:

Appellant's motion for rehearing in the above cause is this day overruled.

Very truly yours,

ELIZABETH LEBLANC
Clerk

IN THE SUPREME COURT OF TEXAS
AUSTIN

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May 26, 1965

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No. A-10697

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ELLEN D. BAY, Et Al.

v.

JOHN W. MECOM, Et Al.

---

From Liberty County, Ninth District.

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Application of petitioners for writ of error to the Court of Civil Appeals for the Ninth Supreme Judicial District having been duly considered, it is ordered that said application be, and hereby is, granted, and that writ of error issue as prayed for therein.

It is further ordered that this cause be, and hereby is, set for hearing, submission and argument for Wednesday, June 24, 1965 at 9 a.m.

---

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above is a true and correct copy of order of the Supreme Court granting application for writ of error in the case of ELLEN D. BAY, ET AL. vs. JOHN W. MECOM, ET AL., No. A-10697, from Liberty County, Ninth District, as such order appears in the minutes of said Court under the date of May 26, 1967.

IN TESTIMONY WHEREOF, Witness my hand and the seal of the Supreme Court of Texas, at the City of Austin on this 2nd day of June, 1967.

GARSON R. JACKSON
Garson R. Jackson, Clerk

(Seal)

IN THE SUPREME COURT OF TEXAS

---

No. A-10697

---

ELLEN D. BAY, ET AL., Petitioners

v.

JOHN W. MECOM, TRUSTEE, ET AL., Respondents

---

From Liberty County, Ninth District.

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Ellen D. Bay, Overton B. Banks and W. F. Hooks, petitioners, sought to appeal from two judgments of the District Court for the 75th Judicial District, Liberty County. The judgments were entered in causes numbered 16,695 and 16,695-A on the docket of the trial court. The Court of Civil Appeals dismissed the appeals of all three petitioners in both causes. 387 S.W.2d 482. We sever the two causes, and affirm the judgment of the Court of Civil Appeal in cause No. 16,695-A. In cause No. 16,695 we affirm the judgment of dismissal of the appeal of Ellen D. Bay, but reverse the judgment of dismissal of the appeal of Banks and Hooks. We remand cause No. 16,695 to the Court of Civil Appeals with directions to reinstate the appeal of Banks and Hooks on the docket for a determination of the appeal on its merits.

The Court of Civil Appeals dismissed the appeals of all three petitioners in both causes because petitioners filed in that court a single transcript containing copies of all papers and orders relating to both causes and the separate

judgments entered therein. In support of its action the Court of Civil Appeals cited Mohr v. Cochran, Tex.Civ. App., 49 S.W. 677 (1899), writ dismissed, and Missouri, K. & T. Ry. Co. of Texas v. Davison, Tex.Civ.App., 55 S.W. 188 (1900). We do not consider those cases as controlling. The Court of Civil Appeals did not dismiss the appeal in Mohr v. Cochran; it struck the transcript and affirmed on certificate. This Court thereafter dismissed application for writ of error. Writ of error was not sought in Missouri, K. & T. Ry. Co. v. Davison, and the opinion of the Court of Civil Appeals in that case clearly indicates an obvious misinterpretation by the court of Mohr v. Cochran. Neither is the action of the Court of Civil Appeals in this case supported by Chambers v. Fisk, 9 Tex. 261 (1852), cited by respondents. In that case the appellant sought to perfect an appeal from three different judgments by filing a single appeal bond, and the appeal was dismissed for want of a sufficient bond. That is not the situation in this case. While not precisely in point on the facts, the clear holding of this Court in Metropolitan Trust Co. v. Farmers' & Merchants' Nat. Bank, 89 Tex. 329, 34 S.W. 736 (1896), is that an appeal is not to be dismissed merely because more than one final judgment is appealed from and embraced in the appeal.

Rule 1[1] dictates that a liberal construction be given the Rules of Civil Procedure "to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law." Rule 376 requires the clerk of a trial court to prepare a transcript under the direction of the appellant, and Rule 370 enlists the cooperation of the appellant in including in the tran-

1. All references to Rules are to Texas Rules of Civil Procedure.

script only those documents and orders necessary to a full and fair consideration of the questions to be decided on the appeal. We find nothing in the Rules, however, which requires or authorizes the dismissal of an appeal, otherwise validly perfected, merely because the transcript includes matters unrelated to the appeal or matters relating to two causes and two judgments. Appellate review of trial court judgments disposing of the substantive rights of litigants is a valuable right and should not be denied when under a liberal interpretation of the Rules it is possible to give it. If any one or more of the three petitioners had a right to appeal and perfected one from the judgments in the two causes, or from either of them, they are entitled to have the appeal considered and decided on its merits.

The transcript filed in the Court of Civil Appeals contains four hundred and fifty-five pages. No good purpose would be served by analyzing it in detail in this opinion. It reflects that a suit by Ellen Bay against Mecom, Sun Oil Company, Weaver, Freeport Sulphur Company, Banks and Hooks, numbered 16,695 on the docket of the trial court, became three suits by virtue of orders of severance entered by that court. The three suits were numbered 16,695, 16,695-A and 16,695-B on the trial court's docket. Final judgments, of one type or another, were rendered in all three suits. While use of erroneous cause numbers on some of the papers filed and orders and judgments entered has created a confusion difficult to unravel, a careful analysis of the transcript leads us to the following conclusions: (1) Banks and Hooks had no right of appeal from the only final judgments entered in cause No. 16,695-A. (2) Ellen Bay had a right of appeal from the judgment entered in cause No. 16,695-A, but she did

not perfect her appeal therefrom. (3) Ellen Bay had no right of appeal from the judgment entered in cause No. 16,695, and her effort to perfect an appeal therefrom is abortive. (4) Banks and Hooks had a right of appeal from the judgment entered in cause No. 16,695, and they duly perfected their appeal therefrom.

Banks and Hooks seek to have this Court adjudicate the merits of their appeal. We cannot do so. When a Court of Civil Appeals erroneously dismisses an appeal, this Court can only affirm the judgment of dismissal or reverse the judgment and order the case reinstated on the docket of the Court of Civil Appeals for a determination of the merits of the appeal. Hargrove v. Insurance Inv. Corporation, 142 Tex. 111, 176 S.W.2d 744 (1944); Frank v. Tatum, 87 Tex. 204, 25 S.W. 409 (1894). See also Ward v. Scarborough, Tex.Com.App., 236 S.W. 441 (1922).

Based upon the conclusions enumerated, we render judgment as hereinabove set out. Costs in this Court are adjudged one-half to petitioners and one-half to respondents Mecom, Weaver and Freeport Sulphur Company.

ROBERT W. CALVERT
Robert W. Calvert

Associate Justice Smith dissenting.

Opinion delivered: July 21, 1965

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the attached four (4) pages contain a true and correct copy of opinion of the Supreme Court of Texas in the case of ELLEN D. BAY ET AL. vs. JOHN W. MECOM ET AL., No. A-10697, from Liberty County, Ninth District, as the original of same appears of record on file in this office.

IN TESTIMONY WHEREOF, Witness my hand and the seal of the Supreme Court of Texas, at the City of Austin, on this 2nd day of June, 1967.

GARSON R. JACKSON
Garson R. Jackson, Clerk

(Seal)

CLERK'S OFFICE – SUPREME COURT

Austin, Texas, October 6, 1965.

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of BAY ET AL. v. MECOM ET AL., No. A-10697, was this day overruled. (Both motions overruled) (Both motions to amend application overruled)

Very truly yours,

GEO. H. TEMPLIN, Clerk

COURT OF CIVIL APPEALS
Eleventh Supreme Judicial District
Eastland, Texas

October 4, 1966

NOTICE OF SUBMISSION

Hon. Overton B. Banks
Attorney at Law
466 San Jacinto Bldg.
Houston, Texas

Fouts, Moore, Caldwell & Coleman
Attorneys at Law
2010 Gulf Bldg.
Houston, Texas

Orgain, Bell & Tucker
Attorneys at Law
1st Federal Savings Bldg.
Beaumont, Texas

Hon. J. L. LyBrand
Attorney at Law
Sun Oil Co.—Legal Dept.
Petroleum Building
Beaumont, Texas

(BEAUMONT CCA # 6624A)

Re ELLEN D. BAY ET AL
Vs. No. 4141
John W. Mecom

Gentlemen:

The above styled and numbered cause is set for submission and oral argument at 9:00 A.M. ON MONDAY,

NOVEMBER 7, 1966, IN THE BEAUMONT CCA COURTROOM. THIS CASE WAS TRANSFERRED TO OUR COURT BY ORDER OF THE SUPREME COURT OCTOBER 3, 1966.

PLEASE ACKNOWLEDGE RECEIPT OF THIS NOTICE ON THE ENCLOSED CARD IF YOU DESIRE ORAL ARGUMENT AND RETURN IMMEDIATELY.

All records must be in this office one week prior to the above submission date.

With kindest wishes, I am

Yours very truly,

HOMER SMITH, Clerk

Enc: 1

Overton B. Banks et al,
Appellants

Vs. No. 4141

John W. Mecom, Trustee, et al,
Appellees

Appeal from the 75th Judicial District Court of Liberty County.

This appeal originally involved appeals of Ellen D. Bay, Overton B. Banks and W. F. Hooks in which appellees were John W. Mecom, trustee, hereafter referred to as Mecom, Carnes W. Weaver, Freeport Sulphur Company, Sinclair Oil and Gas Company and Sun Oil Company. These appeals were dismissed with opinion reported in 387 SW 2d 482. Our Supreme Court in an opinion reported in 393 SW 2d page 819 affirmed the dismissal of the appeals of Ellen D. Bay and the dismissal of the appeal of Banks and Hooks against Sun Oil Company, but found that Banks and Hooks had the right to appeal from the summary judgment rendered against them when the court sustained the motions of Mecom, Weaver and Freeport Sulphur Company. That appeal is now before this court for determination.

The suit was originally filed by Ellen D. Bay, lessor of a mineral lease covering a fraction of an acre in the town of Hull. The lease dated October 28, 1949 was to Overton B. Banks and authorized the lessee to pool and combine it with other leases. The pooling provision of the lease was as follows:

> "Lessee, at its option, is hereby given the right and power to pool or combine the acreage covered by

this lease, or any portion thereof as to oil and gas, or either of them, with other land, lease or leases in the immediate vicinity thereof to the extent, hereinafter stipulated, when in Lessee's judgment it is necessary or advisable to do so in order properly to develop and operate said leased premises in compliance with the spacing rules of the Railroad Commission of Texas, or other lawful authority, or when to do so would, in the judgment of Lessee, promote the conservation of oil and gas from said premises. Units pooled for oil hereunder shall not substantially exceed 40 acres each in area, and units pooled for gas hereunder shall not substantially exceed in area 640 acres each plus a tolerance of 10% thereof, provided that should governmental authority having jurisdiction prescribe or permit the creation of units larger than those specified, units thereafter created may conform substantially in size with those prescribed by governmental regulations."

The record shows that Banks, on October 29, 1954, assigned the lease to John W. Mecom, predecessor in title to John W. Mecom, trustee. The assignment to Mecom reserved to Banks and Hooks a 1/8th overriding royalty. It contained a provision recognizing the right to pool in accordance with the terms of the lease. On December 29, 1954 said lease covering the fractional acre was pooled with other small leases in the immediate vicinity into a pooled unit of less than 20 acres, with the stated right to thereafter, within 5 years include other adjacent tracts until the total acreage included in the unit amounted to 20 acres. Thereafter a well was drilled and completed on the unit, said well being located on the property covered by the Bay lease. The first production from the well was in March 1955. After completion of the well suit was filed by Ellen Bay against appellees seeking to cancel the unit.

Hooks and Banks were also named defendants. Hooks and Banks filed a cross action against appellees seeking cancellation of the unit, and filed a motion for summary judgment. Appellees also filed a motion for summary judgment. The motion of appellees was granted and judgment was rendered sustaining the validity of the unit. It is that judgment of which appellants Banks and Hooks here complain.

Appellees' motion for summary judgment asserted that no genuine issues of fact existed in the case arising under appellants' pleadings or otherwise; that appellants' pleadings admitted that pooling was authorized under the pooling provision in the lease, as hereinabove quoted; that appellants only alleged ground of invalidity of the pooled unit was in substance that the unit was not authorized by the pooling provision because it was not authorized by the Railroad Commission of Texas, in that, the Hull field in Liberty County in which the lease and unit were located had been classified by the Railroad Commission as, and at all times material hereto has been classified as, a "piercement type" salt dome field, and that in such type of field the commission makes no limitations on the distances wells may be drilled from lease lines or from each other; that the Hull field was thus a non prorated field, exempt from spacing rules and, therefore, pooling and unitization were prohibited and restricted.

From an examination of the pleadings, the motions for summary judgment and the affidavits filed by the parties in support of and in opposition thereto, we are of the opinion that there is no genuine issue as to any material fact in the case. The mineral interest Pooling Act, Article 6008c, V.A.T.C.S. enacted in 1965 was not in effect at any time material to a determination of this cause. The

general rule prior to such Act was that pooling was governed by the law of contract. Humble Oil & Refining Co. et al v. Carr, 243 SW 2d 709, (CCA 1951, ref. n.r.e.); Dailey v. Railroad Commission, 133 SW 2d 219, (CCA 1939, writ ref.).

The authority to pool as shown in the pooling provision of the lease as herein set out is undisputed. It was provided therein that units pooled for oil should not substantially exceed 40 acres. It is undisputed that appellee Mecom executed an instrument forming a unit of less than 20 acres prior to the commencement and drilling of the oil well on the Bay fractional acre lease. It is undisputed that at that time there was production in the Hull field south of the unit here involved and that such production was from units of approximately 20 acres, and that there was also such a 20 acre unit to the east. The controversy between the parties arises from appellants' contention that the pooling unit in question was unauthorized by and exceeded the authority to pool provided for in the Ellen D. Bay lease to Overton B. Banks. Appellants' contention in this respect as set out in their first point is as follows:

> "The per well or 100% well factor, no acreage factor, proration of wells and the absence of any spacing or unit rules for the Hull piercement type salt dome field precludes as a matter of law the creation of a pooled unit in said field; wherefore the unit designation of December 29, 1954 is a nullity without vitality or legal effect, and never became lawful nor effective as a pooled unit for the conservation of oil and/or gas; and had no effect whatsoever on Appellants overriding royalty of 1/8th of the oil produced from the Bay well effective as of date of first production and continuously thereafter."

As authority for their contention appellants rely upon the recent Texas Supreme Court case of Jones v. Killingsworth, 403 SW 2d 325. In our opinion that case does not support appellants' contention. In that case it was held that an oil, gas and mineral lease pooling clause limiting units pooled for oil to an area not substantially exceeding 40 acres but permitting units to conform in size with those *prescribed* by government regulations, if such regulations prescribed or permit larger units, did not authorize a 170.86 acre unit, where the rule governing the field provided that no proration unit should consist of more than 80 acres but permitted the operators to elect to assign an additional 80 acres and receive allowable credit of not more than 160 acres. In the instant case the Railroad Commission did not by rule or regulation prescribe or permit larger units in the Hull field than the 40 acre limit provided for in the pooling clause of the lease. The pooling instrument executed by Mecom on December 29, 1954 pooled a unit of less than 20 acres, an area well within the 40 acre limit. There was no need or occasion for appellee Mecom to rely upon a regulation or rule of the Railroad Commission enlarging such 40 acre provision, if such a rule had existed. Appellants' contention that the pooled unit was invalid because the Hull field was at all times material hereto classified as a "piercement type" salt dome field, and that in the Hull field there was a complete absence of any spacing or unit rules for oil wells drilled therein, is not well taken and is overruled. The pooling unit complained of was for less than 20 acres and well within the 40 acre limit provided by the pooling provision of the lease.

Mecom as lessee had the right and power to pool the acreage covered by the lease with other leases in the im-

mediate vicinity when in his judgment such pooling "would promote the conservation of oil and gas from said premises." The lessee in such cases is of course required to exercise good faith in making a determination to pool. Tiller v. Fields, 301 SW 2d 185, (Ct.Civ. Apps. 1957). The affidavits of appellees in support of their motion for summary judgment clearly show good faith. Appellants have not denied but on the contrary have admitted that the unit designation in question was made in good faith. The court did not err in granting appellees' motion for summary judgment. Appellants' points are all overruled.

The judgment is affirmed.

CECIL C. COLLINGS
ASSOCIATE JUSTICE

December 16, 1966.

THE STATE OF TEXAS, §
COUNTY OF EASTLAND, §

I, HOMER SMITH, Clerk of the Court of Civil Appeals in and for the Eleventh Supreme Judicial District of Texas, do hereby certify that the above and foregoing is a true and correct copy of the original opinion entered in the above styled and numbered cause, as the same appears now of record in my said office.

GIVEN under my hand and seal of office this the 13th day of June, 1967.

HOMER SMITH, CLERK

BY: Oleta M. Moseley
Deputy

(Seal)

No. 4141

OVERTON B. BANKS ET AL,

Vs.

JOHN W. MECOM, TRUSTEE,

From the 75th District Court of Liberty County.

December 16, 1966

Opinion by Collings, A. J.

This cause came on to be heard on the transcript of the record and the same being inspected, it is the opinion of the Court that there was no error in the judgment. It is therefore ordered, adjudged and decreed that the judgment of the trial court be, and the same is hereby, in all things affirmed. It is further ordered that all costs incurred by reason of this appeal be, and the same are hereby, taxed against appellants, Overton B. Banks, Ellen D. Bay, and W. F. Hooks, for which let execution issue, and that this decision be certified below for observance.

No. 4141

OVERTON B. BANKS ET AL,

Vs.

JOHN W. MECOM, TRUSTEE, ET AL,

January 13, 1967

This day came on to be heard Appellants' motion for rehearing and the same, having been duly considered, is hereby overruled.

THE STATE OF TEXAS §
COUNTY OF EASTLAND §

I, HOMER SMITH, Clerk of the Court of Civil Appeals in and for the Eleventh Supreme Judicial District of Texas, do hereby certify that the above and foregoing is a true and correct copy of all orders and judgments entered in the above styled and numbered cause, as the same appear now of record in my said office.

GIVEN UNDER my hand and seal of office this the 13th day of June, 1967.

HOMER SMITH, CLERK

BY: Oleta M. Moseley
Deputy

(Seal)

IN THE SUPREME COURT OF TEXAS

No. B-104 April 12, 1967.

OVERTON B. BANKS ET AL.

vs.

JOHN W. MECOM, TRUSTEE ET AL.

From Liberty County, Eleventh District

Application of petitioners for writ of error to the Court of Civil Appeals for the Eleventh Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicants, Overton B. Banks et al., pay all costs incurred on this application.

No. B-104 May 17, 1967.

OVERTON B. BANKS ET AL.

vs.

JOHN W. MECOM, TRUSTEE ET AL.

From Liberty County, Eleventh District.

Petitioners' motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 26th day of May, 1967.

By /s/ Garson R. Jackson
GARSON R. JACKSON, CLERK

(Seal)

## APPENDIX B

NO. 4692

LEASE DATED: October 28, 1949

ELLEN DOWDEN BAY

To

OVERTON B. BANKS

REV. STAMPS $.55¢

O.B.B. 10/28/49

FILED: December 7, 1949

THIS AGREEMENT made this 28th day of October 1949, between Ellen Dowden Bay, a feme sole, Lessor (whether one or more) whose address is Hull, Texas, and Overton B. Banks of Houston, Texas, Lessee, WITNESSETH:

1. Lessor in consideration of ONE HUNDRED TWENTY-FIVE & NO/100 Dollars ($125.00), in hand paid, of the royalties herein provided, and of the agreement of Lessee herein contained, hereby grants, leases and lets exclusively unto Lessee for the purpose of investigating, exploring, prospecting, drilling and mining for and producing oil, gas and all other minerals, laying pipe lines, building roads, tanks, power stations, telephone lines and other structures thereon to produce, save, take care of, treat, transport and own said products, and housing its employees, the following described land in Liberty County, Texas, to-wit:

Lots Nos. 1, 2, 3 and 4 in Block No. 9 of the Hull Townsite in the S.E. corner of the Norbet Dagle 160 acre survey, Abstract No. 180; being the same land conveyed to Lessor by deed dated March 20, 1948 from George Stinnett recorded in Volume 209, Page 258 of the Deed Records of Liberty County, Texas.

This lease also covers and includes all land owned or claimed by Lessor adjacent or contiguous to the land particularly described above, whether the same be in said survey or surveys or in adjacent surveys, although not included within the boundaries of the land particularly described above. For the purpose of calculating the rental payments hereinafter provided for, said land is estimated to comprise One acres, whether it actually comprises more or less.

2. Subject to the other provisions herein contained, this lease shall be for a term of Five years from this date (called "primary term") and as long thereafter as oil, gas or other mineral is produced from said land or lands with which said land is pooled hereunder.

3. The royalties to be paid by Lessee are: (a) on oil, one-eighth of that produced and saved from said land, the same to be delivered at the wells or to the credit of Lessor into the pipe line which the wells may be connected; Lessee may from time to time purchase any royalty oil in its possession, paying the market price therefor prevailing for the field where produced on the date of purchase; (b) on gas, including casinghead gas or other gaseous substance, produced from said land and sold or used off the premises or for the extraction of gasoline or other product therefrom, the market value at the well of one-eighth of the gas so sold or used, provided that on gas sold at the well the royalty shall be one-eighth of the

amount realized from such sale; while there is a gas well on this lease, or on acreage pooled therewith, but gas is not being sold or used, Lessee may pay as royalty at monthly intervals a sum equal to one-twelfth (1/12) of the amount of the annual rental payable in lieu of drilling operations during the primary term on the number of acres subject to this lease at the time such payment is made, and if such payment is made or tendered, it will be considered that gas is being produced from this lease in paying quantities; and (c) on all other minerals mined and marketed, one-tenth either in kind or value at the well or mine, at Lessee's election, except that on sulphur mined and marketed the royalty shall be fifty cents (50¢) per long ton, Lessee shall have free use of oil, gas, coal, and water from said land, except water from Lessor's wells, for all operations hereunder, and the royalty on oil, gas and coal shall be computed after deducting any so used. Lessor shall have the privilege at his risk and expense of using gas from any gas well on said land for stoves and inside lights in the principal dwelling thereon out of any surplus gas not needed for operations hereunder.

4. Lessee, at its option, is hereby given the right and power to pool or combine the acreage covered by this lease, or any portion thereof as to oil and gas, or either of them, with other land, lease or leases in the immediate vicinity thereof to the extent, hereinafter stipulated, when in Lessee's judgment it is necessary or advisable to do so in order properly to develop and operate said leased premises in compliance with the spacing rules of the Railroad Commission of Texas, or other lawful authority, or when to do so would, in the judgment of Lessee, promote the conservation of oil and gas from said premises. Units

pooled for oil hereunder shall not substantially exceed 40 acres each in area, and units pooled for gas hereunder shall not substantially exceed in area 640 acres each plus a tolerance of 10% thereof, provided that should governmental authority having jurisdiction prescribe or permit the creation of units larger than those specified, units thereafter created may conform substantially in size with those prescribed by governmental regulations. Lessee under the provisions hereof may pool or combine acreage covered by this lease, or any portion thereof as above provided as to oil in any one or more strata and as to gas in any one or more strata. The units formed by pooling as to any stratum or strata need not conform in size or area with the unit or units into which the lease is pooled or combined as to any other stratum or strata, and oil units need not conform as to area with gas units. The pooling in one or more instances shall not exhaust the rights of the Lessee hereunder to pool this lease or portions thereof into other units. Lessee shall execute in writing an instrument or instruments identifying and describing the pooled acreage. The entire acreage so pooled into a tract or unit shall be treated for all purposes except the payment of royalties as if it were included in this lease, and drilling or reworking operations thereon and production of oil and gas, or either of them, from any stratum or strata so pooled shall be considered for all purposes except the payment of royalties as if the operations were on and production were from the land covered by this lease, whether or not the well or wells be located on the premises covered by this lease. In lieu of the royalties elsewhere herein specified, Lessor shall receive, on pooled production from a stratum or strata unitized under the provisions hereof, only such portion of the royalties

stipulated herein as the amount of acreage (surface acres) covered by this lease and included in the unit as to the unitized stratum or strata, or Lessor's royalty interest therein on an acreage basis, bears to the total acreage (surface acres) so pooled in the particular unit involved; provided, however, no reduction of shut-in gas royalties shall be made under this provision. The production from an oil well will be considered as production from the lease or oil pooled unit from which it is producing and not as production from the gas pooled unit; and production from a gas well will be considered as production from the lease or gas pooled unit from which it is producing and not from an oil pooled unit.

5. If operations for drilling are not commenced on said land or on acreage pooled therewith as above provided on or before one year from this date the lease shall then terminate as to both parties, unless on or before such anniversary date Lessee shall pay or tender to Lessor or to the credit of Lessor in Hull State Bank at Hull, Texas (which bank and its successors are Lessor's agent and shall continue as the depository for all rentals payable hereunder regardless of changes in ownership of said land or the rentals), the sum of TWENTY FIVE & NO/100 Dollars ($25.00), (herein called rentals,) which shall cover the privilege of deferring commencement of drilling operations for a period of twelve (12) months. In like manner and upon like payments or tenders annually the commencement of drilling operations may be further deferred for successive periods of twelve (12) months each during the primary term. The payment or tender of rental under this paragraph and of royalty under paragraph 3 on any gas well from which gas is not being sold or used may be made by the check or draft of Lessee mailed or de-

livered to Lessor or to said bank on or before the date of payment. If such bank (or any successor bank) should fail, liquidate or be succeeded by another bank, or for any reason fail or refuse to accept rental, Lessee shall not be held in default for failure to make such payment or tender of rental until thirty (30) days after Lessor shall deliver to Lessee a proper recordable instrument, naming another bank as agent to receive such payments or tenders. The down cash payment is considered for this lease according to its terms and shall not be allocated as a mere rental for a period. Lessee may at any time or times execute and deliver to Lessor or to the depository above named or place of record a release or releases covering any portion or portions of the above described premises and thereby surrender this lease as to such portion or portions and be relieved of all obligations as to the acreage surrendered and thereafter the rentals payable hereunder shall be reduced in the proportion that the acreage covered hereby is reduced by said release or releases.

6. If prior to discovery of oil, gas or other mineral on said land or on acreage pooled therewith Lessee should drill a dry hole or holes thereon, or if after the discovery of oil, gas or other mineral, the production thereof should cease from any cause, this lease shall not terminate if Lessee commences additional drilling or reworking operations within sixty (60) days thereafter or if it be within the primary term, commences or resumes the payment or tender of rentals or commences operations for drilling or reworking on or before the rental paying date next ensuing after the expiration of sixty days from date of completion of dry hole or cessation of production. If at any time subsequent to sixty (60) days prior to the beginning of the

last year of the primary term and prior to the discovery of oil, gas or other mineral on said land, or on acreage pooled therewith, Lessee should drill a dry hole thereon, no rental payment or operations are necessary in order to keep the lease in force during the remainder of the primary term. If at the expiration of the primary term, oil, gas or other mineral is not being produced on said land, or on acreage pooled therewith, but Lessee is then engaged in drilling or reworking operations thereon or shall have completed a dry hole within sixty (60) days prior to the end of the primary term, the lease shall remain in force so long as operations are prosecuted with no cessation of more than sixty (60) consecutive days, and if they result in the production of oil, gas or other mineral, so long thereafter as oil, gas or other mineral is produced from said land or acreage pooled therewith. In the event a well or wells producing oil and gas in paying quantities should be brought in on adjacent land and within three hundred thirty (330) feet of and draining the leased premises, or acreage pooled therewith, Lessee agrees to drill such offset wells as a reasonably prudent operator would drill under the same or similar circumstances.

7. Lessee shall have the right at any time during or after the expiration of this lease to remove all property and fixtures placed by Lessee on said land, including the right to draw and remove all casing. When required by Lessor, Lessee will bury all pipe lines below ordinary plow depth, and no well shall be drilled within two hundred (200) feet of any residence or barn now on said land without Lessor's consent.

8. The right of either party hereunder may be assigned in whole or in part, and the provisions hereof shall extend to their heirs, successors and assigns; but no change or

division in ownership of the land, rentals or royalties, however accomplished, shall operate to enlarge the obligations or diminish the rights of Lessee; and no change or division in such ownership shall be binding on Lessee until thirty (30) days after Lessee shall have been furnished by registered U.S. mail at Lessee's principal place of business with a certified copy of recorded instrument or instruments evidencing same. In the event of assignment hereof in whole or in part, liability for breach of any obligation hereunder shall rest exclusively upon the owner of this lease or any portion thereof who commits such breach. In the event of the death of any person entitled to rentals hereunder, Lessee may pay or tender such rentals to the credit of the deceased or the estate of the deceased until such time as Lessee is furnished with proper evidence of the appointment and qualification of an executor or administrator of the estate, or if there be none, then until Lessee is furnished with evidence satisfactory to it as to the heirs or devisees of the deceased and that all debts of the estate have been paid. If at any time two or more persons be entitled to participate in the rental payable hereunder, Lessee may pay or tender said rental jointly to such persons or to their joint credit in the depository named herein; or, at Lessee's election, the proportionate part of said rental to which each participant is entitled may be paid or tendered to him separately or to his separate credit in said depository; and payment or tender to any participant of his portion of the rentals hereunder shall maintain this lease as to such participant. In event of assignment of this lease as to a segregated portion of said land, the rentals payable hereunder shall be apportionable as between the several leasehold owners ratably according to the surface area of each, and default in rental payment by one shall not affect the rights of

other leasehold owners hereunder. If six or more parties become entitled to royalty hereunder, Lessee may withhold payment thereof unless and until furnished with a recordable instrument executed by all such parties designating an agent to receive payment for all.

9. The breach by Lessee of any obligation arising hereunder shall not work a forfeiture or termination of this lease nor cause a termination or reversion of the estate created hereby nor be grounds for cancellation hereof in whole or in part. In the event Lessor considers that operations are not at any time being conducted in compliance with this lease, Lessor shall notify Lessee in writing of the facts relied upon as constituting a breach hereof, and Lessee, if in default, shall have sixty days after receipt of such notice to which to commence the compliance with the obligation imposed by virtue of this instrument. After the discovery of oil, gas or other mineral in paying quantities on said premises, Lessee shall reasonably develop the acreage hereunder, but in discharging this obligation, it shall in no event be required to drill more than one well per forty acres of the area retained hereunder and capable of producing oil in paying quantities and one well per 640 acres plus an acreage tolerance not to exceed 10% of 640 acres of the area retained hereunder and capable of producing gas or other mineral in paying quantities.

10. Lessor hereby warrants and agrees to defend the title to said land and agrees that Lessee at its option may discharge any tax, mortgage or other lien upon said land, either in whole or in part, and in event Lessee does so, it shall be subrogated to such lien with right to enforce same and apply rentals and royalties accruing hereunder toward satisfying same. Without impairment of Lessee's rights under the warranty in event of failure of title, it is

agreed that if Lessor owns an interest in the oil, gas or other minerals on, in or under said land less than the entire fee simple estate, then the royalties and rentals to be paid Lessor shall be reduced proportionately. Failure of Lessee to reduce rental paid hereunder shall not impair the right of Lessee to reduce royalties.

11. Should Lessee be prevented from complying with any express or implied covenant of this lease, from conducting drilling or reworking operations thereon or from producing oil or gas therefrom by reason of scarcity of or inability to obtain or to use equipment or material or by operation of force majeure, any Federal or state law or any order, rule or regulation of governmental authority, then while so prevented Lessee's obligation to comply with such covenant shall be suspended, and Lessee shall not be liable in damages for failure to comply therewith; and this lease shall be extended while and so long as Lessee is prevented by any such cause from conducting drilling or reworking operations on or from producing oil or gas from the leased premises; and the time while Lessee is so prevented shall not be counted against Lessee, anything in this lease to the contrary notwithstanding.

IN WITNESS WHEREOF, this instrument is executed on the date first above written.

Ellen Dowden Bay

THE STATE OF TEXAS )
COUNTY OF LIBERTY ) Before me, the undersigned authority, on this day personally appeared Ellen Dowden Bay, a feme sole, known to me to be the identical person whose name *are*/is subscribed to the foregoing instrument, and ackowledged to me that she executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this the 28th day of October A.D., 1949.

Steve Green, Notary Public in and for Liberty County, Texas

FILED FOR RECORD: December 7, 1949, A.D., at 8:00 o'clock A.M.

RECORDED: December 7, 1949, A.D., at 10:20 o'clock A.M.

MRS. L. V. HIGHTOWER, COUNTY CLERK

By Marguerite Allday, Deputy

THE STATE OF TEXAS )
COUNTY OF LIBERTY )

I, MRS. L. V. HIGHTOWER, COUNTY CLERK IN AND FOR LIBERTY COUNTY, TEXAS, DO HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS A TRUE AND CORRECT PHOTOSTAT OF LEASE DATED OCTOBER 28, 1949 FROM ELLEN DOWDEN BAY TO OVERTON B. BANKS AS THE SAME APPEARS OF RECORD IN VOL. 325, PAGE 302 OF THE DEED RECORDS OF LIBERTY COUNTY, TEXAS.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, THIS THE 16th DAY OF OCTOBER, 1962.

MRS. L. V. HIGHTOWER, COUNTY CLERK, LIBERTY COUNTY, TEXAS.

By Lona Partain Deputy

## ASSIGNMENT OF LEASE WITH RESERVATION OF OVERRIDING ROYALTY

THE STATE OF TEXAS )
COUNTY OF LIBERTY )

KNOW ALL MEN BY THESE PRESENTS:

THAT, WHEREAS, heretofore on the 28th day of October, 1949, Ellen Dowden Bay, a feme sole, as Lessor, executed an oil, gas and mineral lease in favor of Overton B. Banks, as Lessee, covering the following described land in Liberty County, Texas, to-wit:

> Lots Nos. 1, 2, 3 and 4, in Block No. 9 of the Hull Townsite in the S.E. corner of the Norbet Dagle 160 acre survey, Abstract No. 180 being the same land conveyed to Lessor by deed dated March 20, 1948, from George Stinnett recorded in Volume 209, Page 258 of the Deed Records of Liberty County, Texas,

said lease being recorded in Volume 325 on Page 302 of the Deed Records of Liberty County, Texas; and

WHEREAS, by instrument dated October 27, 1954, executed by Ellen Dowden Bay in favor of Overton B. Banks, the primary term of said lease was extended for an additional six (6) months;

NOW, THEREFORE, I, Overton B. Banks of Houston, Texas, the present owner of said lease, in consideration of the sum of Ten Dollars ($10.00) cash in hand paid, receipt of which is hereby acknowledged, do hereby Grant,

Bargain, Sell, Assign and Convey unto John W. Mecom of Houston, Texas, all the estate of the Lessee in and to the above mentioned lease as extended, reserving, however, unto myself, my heirs and assigns, an overriding royalty of one-eighth (1/8th) of the oil, gas and other minerals that may be produced and saved from said land under the terms of said lease, provided if said land is included in a pooled unit in accordance with the terms of said lease, the overriding royalties hereby reserved shall be payable on the basis of production allocated to said land; and such overriding royalty shall also apply to any renewal or extension of said lease, and for value received I hereby Grant, Sell and Convey unto W. F. Hooks of Daisetta, Texas, an undivided one-half (1/2) interest in and to the overriding royalties hereby reserved, so that said overriding royalties shall be owned in equal proportions by Overton B. Banks and W. F. Hooks.

WITNESS MY HAND at Houston, Texas, this 29th day of October, A. D. 1954.

OVERTON B. BANKS
Overton B. Banks.

THE STATE OF TEXAS )
COUNTY OF HARRIS )

BEFORE ME, the undersigned authority, on this day personally appeared Overton B. Banks, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledge to me that he executed the same for the purposes and consideration therein expressed.

GIVEN under my hand and seal of office this the 29th day of October, A. D. 1954.

MARY LOU STILL
Notary Public in and for Harris County, Texas.

(Seal)

THE STATE OF TEXAS:
COUNTY OF LIBERTY:

I, MRS. L. V. HIGHTOWER, Clerk of the County Court in and for said County, do hereby certify that the above and foregoing instrument of writing with its certificate of authentication was filed for record in my office the 30th day of Dec., 1954 at 4:15 o'clock P.M. and duly recorded the 4th day of Jan., 1955 at 10:15 o'clock A.M. in Deed Record vol. 414 on page 211.

WITNESS MY HAND AND SEAL of County Court of said County at office in Liberty, Texas, the day and year last above written.

MRS. L. V. HIGHTOWER,
Clerk County Court, Liberty County, Texas

By Barbara Villemez, Deputy

(Seal)

## UNIT DESIGNATION

JOHN W. MECOM, TRUSTEE, owner of the Oil, Gas and Mineral Leases described on the attached Exhibit "A", pursuant to the authority granted in said leases, hereby designates as the "JOHN W. MECOM, TRUSTEE-ELLEN BAY, ET AL UNIT" all of the land in Liberty County, Texas, described on the attached Exhibit "B".

All of the land included within the Unit designated above, and all of said leases insofar as they cover land within said Unit, are hereby pooled and combined as to oil, gas and other minerals, into a single unit for drilling, production and development purposes.

JOHN W. MECOM, TRUSTEE, reserves unto himself, his successors and assigns, to the extent of his authority, the right at any time, and from time to time, but in no event beyond Five (5) years from the date hereof, to include as a part of this Unit any acreage adjacent thereto, including any of the excepted lots or tracts described in Exhibit "B", until the aggregate number of acres included in said Unit equal Twenty (20) acres.

EXECUTED this 29th day of December, 1954.

JOHN W. MECOM, TRUSTEE
John W. Mecom, Trustee

THE STATE OF TEXAS )
COUNTY OF HARRIS )

BEFORE ME, the undersigned authority, on this day personally appeared JOHN W. MECOM, TRUSTEE, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed, and in the capacity therein stated.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this the 29th day of December, 1954.

LOUISE L. PERDUE
Notary Public in and for Harris County, Texas

(Seal)

## EXHIBIT "A"

1. Oil, Gas and Mineral Lease dated October 28, 1949, from ELLEN DOWDEN BAY, a feme sole, as Lessor, to OVERTON B. BANKS, as Lessee, recorded in Vol. 325, Page 302, Deed Records of Liberty County, Texas, as extended by Extension Agreement dated October 27, 1954, executed by Ellen Dowden Bay, recorded in Vol. 411, Page 255, said records of said county.

2. Oil, Gas and Mineral Lease dated December 2, 1954, from JOSEPH A. CHESNUTT, et ux, as Lessors, to RALPH B. LEE, as Lessee, covering all lots or lands owned by said Lessors in the Chesnutt Addition to the Town of Hull, Texas.

3. Oil, Gas and Mineral Lease dated October 28, 1954, from PEARL CHESNUTT McCOY, et vir, as Lessors, to JOHN W. MECOM, as Lessee, covering all lots or lands owned by said Lessors in the Chesnutt Addition to the Town of Hull, Texas.

4. Oil, Gas and Mineral Lease dated October 22, 1954, from ANNE JEAN CHESNUTT, a widow, and GAIL B. CHESNUTT, as Lessors, to JOHN W. MECOM, as Lessee, recorded in Vol. 411, Page 337, Deed Records of Liberty County, Texas.

5. Oil, Gas and Mineral Lease dated November 3, 1954, from WILLIAM GILBERT SHIVERS, et ux, as Lessors, to JOHN W. MECOM, as Lessee, covering Two (2) acres, more or less, situated in the Norbert Daigle Survey, Abstract No. 180 and being the same land described in that certain Oil, Gas and Mineral Lease dated October 29, 1949, from Lessors to John W. Mecom, recorded in Vol. 322, Page 418 of the Deed

Records of Liberty County, Texas, as ratified by Ratification dated November 4, 1954, executed by H. V. Watson, et ux, and by Ratification dated November 4, 1954, executed by J. O. White, et ux.

6. Oil, Gas and Mineral Lease dated October 27, 1954, from LAURENA McMURTRAY, a feme sole, et al, as Lessors, to JOHN W. MECOM, as Lessee, recorded in Vol. 411, Page 600, Deed Records of Liberty County, Texas.

7. Oil, Gas and Mineral Lease dated October 27, 1954, from THOMAS E. LEVI, et ux, as Lessors, to JOHN W. MECOM, as Lessee, covering the same land described in the next above described lease.

8. Oil, Gas and Mineral Lease dated November 3, 1954, from MINNIE LEE ALLEN CAMPBELL, et vir, as Lessors, to JOHN W. MECOM, as Lessee, covering 3½ acres, more or less, situated in the Norbert Daigle Survey, Abstract No. 180, and being the same land described in oil, gas and mineral lease dated October 27, 1949 from Minnie Lee Allen Campbell, et al to John W. Mecom and recorded in Vol. 321, page 628 of the Deed Records of Liberty County, Texas, as ratified by Ratification dated November 4, 1954, executed by Arthur J. McGuire.

9. Oil, Gas and Mineral Lease dated November 3, 1954, from L. L. HART, et ux, as Lessors, to JOHN W. MECOM, as Lessee, covering 1 acre, more or less, situated in the Norbert Daigle Survey, Abstract No. 180, and being the same land described in that certain oil, gas and mineral lease dated October 29, 1949 from lessors to John W. Mecom and recorded in Vol. 322, page 405 of the Deed Records of Liberty County, Texas.

10. Oil, Gas and Mineral Lease dated November 3, 1954, from WILLIAM GILBERT SHIVERS, Individually and as Independent Executor of the Estate of M. P. Bingham, deceased, et al, as Lessors, to JOHN W. MECOM, as Lessee, covering One-half (½) acre, more or less, situated in the Norbert Daigle Survey, Abstract No. 180, and being the same land described in that certain oil, gas and mineral lease dated October 28, 1949, from M. P. Bingham, et ux to John W. Mecom, recorded in Vol. 322, page 409 of the Deed Records of Liberty County, Texas.

11. Oil, Gas and Mineral Lease dated October 28, 1954, from MRS. R. P. HILL, SR., Individually and as Agent and Attorney in Fact for Dick Hill, Jack Hill and R. P. Hill, Jr., as Lessor, to JOHN W. MECOM, as Lessee, covering Lots 3, 4, 5, 6, 7 and 8 in Block One (1) of the Chesnutt Addition to the Town of Hull, Texas.

12. Oil, Gas and Mineral Lease dated October 24, 1949, from DOUGLAS EMANUEL, et ux, as Lessors, to JOHN W. MECOM, as Lessee, recorded in Vol. 322, Page 400, Deed Records of Liberty County, Texas, as ratified by Ratification dated October 9, 1954, executed by G. C. Miller and wife, Clara Miller, recorded in Vol. 411, Page 32, said records of said county, and by Ratification dated September 21, 1954, executed by H. L. McGuire and A. J. McGuire, recorded in Vol. 412, Page 338, said records of said county.

13. Oil, Gas and Mineral Lease dated March 6, 1951, from MRS. F. J. TOUPS, a widow, as Lessor, to JOHN W. MECOM, as Lessee, recorded in Vol. 366, Page 60, Deed Records of Liberty County, Texas.

14. Oil, Gas and Mineral Lease dated February 27, 1951, from J. F. HORKAN, JR. as Lessor, to JOHN W. MECOM, as Lessee, recorded in Vol. 354, Page 527, Deed Records of Liberty County, Texas.

15. Oil, Gas and Mineral Lease dated February 27, 1951, from J. F. HORKAN, JR., as Lessor, to JOHN W. MECOM, as Lessee, recorded in Vol. 354, Page 530, Deed Records of Liberty County, Texas.

16. Oil, Gas and Mineral Lease dated January 24, 1951, from MRS. T. E. BUFORD, a feme sole, and MRS. IDA BUFORD BUDWINE, a feme sole, as Lessors, to JOHN W. MECOM, as Lessee, recorded in Vol. 347, Page 16, Deed Records of Liberty County, Texas.

17. Oil, Gas and Mineral Lease dated January 24, 1951, from MRS. ARAH BUFORD RUSSELL, et vir, as Lessors, to JOHN W. MECOM, as Lessee, recorded in Vol. 356, Page 590, Deed Records of Liberty County, Texas.

18. Oil, Gas and Mineral Lease dated November 1, 1949, from S. E. BEVERS, et ux, as Lessors, to JOHN W. MECOM, as Lessee, recorded in Vol. 322, Page 197, Deed Records of Liberty County, Texas.

19. Oil, Gas and Mineral Lease dated July 13, 1953, from GUY A. THOMPSON, Trustee, as Lessor, to CHARLES B. WRIGHTSMAN, as Lessee, recorded in Vol. 390, Page 448, Deed Records of Liberty County, Texas, as amended by Agreement dated July 6, 1954 between Lessor and Lessee.

* * * * * *

## EXHIBIT "B"

The following land in the N. Daigle Survey, Abstract No. 180, Liberty County, Texas:

Beginning at a railroad spike set for the S. E. corner of said Daigle Survey;

Thence N 0°-35′ W along the East line of said Daigle Survey, same being the East line of the Chesnutt Addition to the Town of Hull, Texas, a distance of 748 feet to the N. E. corner of Lot 11, Block 3, of said Chesnutt Addition;

Thence S 89°-25′ W 525 feet to the N. W. corner of Lot 31, Block 11, of said Chesnutt Addition;

Thence N 0°-35′ W 25 feet to the N. E. corner of Lot 10, Block 11, of said Chesnutt Addition;

Thence S 89°-25′ W along North line of said Lot 10, a distance of 150 feet to a point on the West line of "West" Street;

Thence N 0°-35′ W along West line of "West" Street 470 feet to S. E. corner of Mrs. Mildred Ferguson (75x42.36 feet) tract;

Thence S 89°-25′ W 42.36 feet to the S. W. corner of said Ferguson tract;

Thence N 0°-35′ W 143.70 feet to the N. E. corner of Minnie Lee Campbell 2.8 acre tract on the South line of the Barr 10 acre tract;

Thence N 89°-34′ W along said Barr tract South line 420 feet to the N. W. corner of said 2.8 acre tract;

Thence S 0°-35′ E along the West line of said 2.8 acre tract and the West line of Jeff Cochran 1.00 acre tract

711.5 feet to the S. W. corner of said Jeff Cochran 1.00 acre tract;

Thence N 89°-25′ E along South line said Jeff Cochran 1.00 acre tract 210 feet to its S. E. corner;

Thence S 0°-35′ E to the N. W. corner of the M. P. Bingham tract;

Thence S 0°-35′ E along the West lines of the M. P. Bingham and F. Shelborn tracts to the S. W. corner of said F. Shelborn tract;

Thence N 80°-25′ E 115 feet to the N. W. corner of the Edna Benfield tract;

Thence S 1°-27′ W along the West line of said Benfield tract 308.51 feet to a point on the South line of the B.S.L. & W. R.R. 100 feet wide strip used for right-of-way;

Thence S 83°-15′ E along said South line of said right-of-way strip 82 feet to its intersection with the South line of the N. Daigle Survey;

Thence N 89°-25′ E along the South line of said N. Daigle Survey 736.13 feet to the place of beginning;

SAVE AND EXCEPT the following lots in the Chesnutt Addition to the Town of Hull, Texas:

Lots 4, 5, 7, 8, 11 and 12 in Block Two;

Lots 1 - 12, inclusive, 21, 22, 25 - 32, inclusive, in Block Six;

Lots 4 - 12, inclusive, 21 - 32, inclusive, in Block Ten;

Lots 21, 22, 23, 24 and 25, in Block Nine;

Lots 1 - 6, inclusive, and 21, 22 and 23, in Block Five;

AND SAVE AND EXCEPT ALSO:

The Mrs. J. W. Shelgreen (sometimes called F. Shelborn) tract of 1/10 acre, more or less;

The F. Shelborn tract of 1/2 acre, more or less;

The J. M. Denby tract of 1/2 acre, more or less; and

The Edna Benfield tract of 1/2 acre, more or less.

THE STATE OF TEXAS:
COUNTY OF LIBERTY:

I, MRS. L. V. HIGHTOWER, Clerk of the County Court in and for said County, do hereby certify that the above and foregoing instrument of writing with its certificate of authentication was filed for record in my office the 30th day of Dec., 1954 at 4:15 o'clock P.M. and duly recorded the 4th day of Jan., 1955 at 10:55 o'clock A.M. in Deed Record, vol. 414 on page 220.

WITNESS MY HAND AND SEAL of County Court of said County at office in Liberty, Texas, the day and year last above written.

MRS. L. V. HIGHTOWER,
Clerk County Court, Liberty
County, Texas.

By Barbara Villemez, Deputy

(Seal)

## EXHIBIT "D"

## RAILROAD COMMISSION OF TEXAS
## OIL AND GAS DIVISION

OIL AND GAS DOCKET NOS. 108, 120, 123, 124, 125, 126, 128, 129, 132, and 146

IN RE: CONSERVATION AND PREVENTION OF WASTE OF CRUDE PETROLEUM AND NATURAL GAS IN THE STATE OF TEXAS

#20-18,346 Austin, Texas

May 17, 1950

## SPECIAL ORDER
## AMENDING ORDER NO. 20-6166, DATED APRIL 20, 1944, REGARDING STATEWIDE SPACING RULE 37, AND AMENDING STATEWIDE RULE 38, OF OIL AND GAS CIRCULAR NO. 16-B, INSOFAR AS THE REQUIREMENTS FOR PLATS ARE CONCERNED

PURSUANT To notice and hearing concerning the adoption of rules and regulations by the Railroad Commission of Texas governing the conservation of crude oil and natural gas and the prevention of waste thereof, and in the light of evidence heretofore introduced at hearings held pursuant to such notices, it is ORDERED By the Ranlroad Commission of Texas that Rules 37 and 38, of statewide application as contained in Division (1) of Oil and Gas Circular No. 16-B, dated May 15, 1934, as heretofore amended, be and the same are hereby further amended to hereafter read and provide as follows:

## RULE 37—STATEWIDE SPACING RULE:

Section (a). No well for oil or gas shall hereafter be drilled nearer than nine hundred thirty-three (933) feet to any well completed in or drilling to the same horizon on the same tract or farm, and no well shall be drilled nearer than three hundred thirty (330) feet to any property line, lease line, or subdivision line; provided that the Commission, in order to prevent waste or to prevent the confiscation of property, may grant exceptions to permit drilling within shorter distances than above prescribed when the Commission shall determine that such exceptions are necessary either to prevent waste or to prevent the confiscation of property.

When exception to such rule is desired, application therefor shall be made by filing Form 1 in duplicate, completely filled out, with the Deputy Supervisor of the Railroad Commission in the Commission District where the well or wells are located, and application shall be accompanied by a plat or sketch drawn to the scale of one (1) inch equalling one thousand (1,000) feet, accurately showing to scale the property on which permit is sought to drill a well under an exception to this rule and accurately showing to scale all other completed, drilling, and permitted wells on said property and accurately showing to scale all adjoining surrounding properties and wells. Such application shall be verified by some person acquainted with the facts, stating that all facts therein stated are within the knowledge of the affiant true and that the accompanying plat is accurately drawn to scale and correctly reflects all pertinent and required data. Such exception shall be granted only after at least ten (10) days' notice to all adjacent lessees affected thereby has been given and after public hearing at which all interested

parties may appear and be heard and after the Commission has determined that an exception to such rule is necessary either to prevent waste or to protect property belonging to the applicant from confiscation.

Section (b). In order to prevent waste or to prevent waste or to prevent the confiscation of property, the Railroad Commission of Texas may, upon its own motion or order, issue or grant a permit or permits for the drilling of any well or wells for oil or gas nearer than nine hundred thirty-three (933) feet to any well completed or drilling to the same horizon on the same tract or farm, and nearer than three hundred thirty (330) feet to any property line, lease line, or subdivision line as hereinbefore prescribed whenever the Commission shall determine that the drilling of any such well or wells is necessary to prevent waste or to prevent the confiscation of property. When in the opinion or judgment of the Commission waste or confiscation of property is reasonably imminent or is taking place on any leasehold, the Commission may, on its own initiative or motion, order a hearing for the purpose of determining whether such waste or confiscation of property is taking place. Such permit or permits shall be issued or granted only after at least ten (10) days' notice to the owners of said leasehold and to all adjacent lessees affected thereby has been given, and after public hearing at which all interested parties may appear and be heard and after the Commission has determined that the drilling of any well or wells for oil or gas is necessary either to prevent waste or to protect the owners of said leasehold from confiscation.

Section (c). In filing Form 1, as hereinabove provided, it shall not be necessary to file more than one plat.

Section (d). In the interest of protecting life and for the purpose of preventing waste and preventing the confiscation of property, the Commission reserves the right in particular oil and gas fields to enter special orders increasing or decreasing the minimum distances provided by this rule.

Section (e). No well drilled in violation of this rule without special permit obtained, issued, or granted in the manner prescribed in said rule, and no well drilled under such special permit or on the Commission's own order which does not conform in all respects to the terms of such permit shall be permitted to produce either oil or gas and any such well so drilled in violation of said rule or on the Commission's own order shall be plugged.

Section (f). This rule shall in no wise rescind, abrogate, or modify the provisions of special orders applicable to the spacing of wells in particular fields requiring minimum spacing distances either greater or smaller than provided herein.

Section (g). This rule shall become effective May 1, 1944, and so remain until changed by order of the Commission.

In the adoption and promulgation of this order, it is her declared that the Commission intends to adopt each phrase, sentence, and paragraph separately and independently of each other such phrase, sentence, and paragraph; and if any portion of this order or any portion of the rule hereby adopted shall be declared invalid, such declaration and such invalidity shall not affect any other portion.

RULE 38—MAP SCALE SPECIFIED:

All maps or sketches of any kind of any separate lease or tract of land, filed with the Oil and Gas Division of the Railroad Commission, must be drawn on a scale of one thousand (1,000) feet to one (1) inch unless the area involved is less than two acres when the scale must be forty (40) feet to one (1) inch, or unless the Commission specifically grants permission that maps furnished may be drawn on another scale.

IT IS FURTHER ORDERED That this Cause be held open on the Docket for such other and further orders as may be necessary.

RAILROAD COMMISSION OF TEXAS

W. J. Murray Jr.
Chairman

Ernest B. Thompson
Commissioner

## EXHIBIT F

## RAILROAD COMMISSION OF TEXAS

STATE OF TEXAS
COUNTY OF TRAVIS

I, O. D. HYNDMAN, Secretary of the Railroad Commission of Texas, do hereby certify that the attached

Form 1, Plat & Telegram
Ellen Bay et al Lease Well #1
John W. Mecom, Trustee Operator
Liberty County

are true and correct copies of the original document(s) now on file as a part of the permanent records of the Railroad Commission of Texas, and I further certify that I am the legal custodian of the records, files and seal of the Railroad Commission of Texas.

GIVEN under my hand and seal of the Railroad Commission of Texas, this the 9th. day of December, 1960.

O. D. Hyndman
O. D. HYNDMAN, SECRETARY
RAILROAD COMMISSION OF TEXAS

(Seal)

## RAILROAD COMMISSION OF TEXAS
## OIL AND GAS DIVISION

### READ CAREFULLY AND COMPLY FULLY

In order that it may be ascertained whether or not the proposed location covered by this notice conforms to the applicable spacing regulations set down by the Railroad Commission, there are two important footages that must be shown; that is, THE NEAREST DISTANCE OF PROPOSED LOCATION FROM LEASE OR PROPERTY LINE AND DISTANCE OF PROPOSED LOCATION FROM THE NEAREST WELL ON THE SAME LEASE. Do not begin drilling operations on any location prior to filing Form 1 and until permit granted by the Commission has been received and waiting clause period has terminated.

For the purpose of this determination draw on the back side hereof a neat, accurate sketch, made to scale, of this lease, block, or lot locating thereon the proposed site for this location with reference to the two nearest lease lines. Also show the nearest wells on all sides of this location and the distance from the proposed location to those wells. In addition to the foregoing, unit boundary designations must be shown for each producing well on the lease and shall include proposed unit boundaries for the location herein applied for showing the acreage to be assigned this well. Give names and addresses of adjoining lease or property owners, and designate all property by lease and company name. You may attach a blue print showing this information if you so desire.

DO NOT CONFUSE SURVEY LINES WITH LEASE LINES. IF THE SKETCH OR BLUE PRINT SHOWS ONLY A SECTION, BLOCK, OR LOT OUT OF YOUR LEASE, DESIGNATE SAME AS BEING ONLY THAT PART OF THE LEASE.

Where the size of the tract will permit, use scale of one inch equaling 1000 feet; if less than 2 acres use scale of one inch equaling 100 feet. DESIGNATE SCALE TO WHICH PLAT OR SKETCH IS DRAWN. ALSO DESIGNATE NORTHERLY DIRECTION ON THE SKETCH OR PLAT.

FILL IN BELOW IN THE SPACES RESERVED FOR THIS PURPOSE THE FOOTAGES ASKED FOR:

Nearest distance from proposed location to property or lease line _____ feet.

Distance from proposed location to nearest drilling, completed, or applied for well on the same lease _____ feet.

Date December 29, 1954

*Name of company or operator*

Name John W. Mecom, Trustee

Address 2900 Gulf Building

City Houston 2, Texas

*Description of farm or lease*:

Name of Lease Ellen Bay, et al

Number of Acres .774 Well No. 1

Number of wells on lease None

Survey N. Dagle, A-180

Elevation - - Feet
(above sea level)

Section No. – Block No.

Located in Hull (Piercement Type Dome) Field

Liberty County

1/4 Miles West direction from

Hull nearest postoffice or town.

Rotary or Cable Tools Rotary

Date work will start drilling Receipt of permit

Depth to which you propose to drill 10,000 feet.

Date work will start deepening - -

WESTERN
UNION

Austin, Texas—December 31, 1954

MR. JOHN R. STEELE, DEPUTY SUPERVISOR
RAILROAD COMMISSION OF TEXAS
HOUSTON, TEXAS

AND

JOHN W. MECOM, TRUSTEE
2900 GULF BUILDING
HOUSTON 2, TEXAS

HAVE TODAY APPROVED PERMIT FOR JOHN W. MECOM, TRUSTEE TO DRILL THEIR ELLEN BAY, ET AL WELL NO. 1 HULL (PIERCEMENT TYPE DOME) FIELD LIBERTY COUNTY, TEXAS. NO ALLOWABLE WILL BE ASSIGNED TO ANY WELL WHICH DOES NOT HAVE SUFFICIENT SURFACE CASING TO PROTECT ALL FRESH WATER SANDS.

HARRY M. BATES, CHIEF SUPERVISOR
RAILROAD COMMISSION OF TEXAS

John W. Mecom, Trustee
2900 Gulf Bldg.
Houston 2, Texas

R. W. BYRAM & COMPANY

Consulting Geologists - Petroleum Engineers
Specialized Oil & Gas Reports on Texas and Louisiana
Since 1921

Phone GReenwood 8-2551
Drawer M,
CAPITOL STATION
Austin, Texas

STATE OF TEXAS
COUNTY OF TRAVIS

My name is R. W. Byram and I live in Austin, Texas. I am the President of R. W. Byram Company, which is a firm engaged in the production of specialized oil field publications including the conservation regulations of the Texas Railroad Commission, Louisiana Oil Conservation Commission and the New Mexico Oil Conservation Commission. I have been engaged in this business continuously since November 17, 1921, when this business was founded.

I am a petroleum geologist engaged in representing, as a consultant, various oil and gas companies at hearings before the Texas Railroad Commission and for various other purposes. I am licensed by the State Board of Professional Engineers, license number 675, issued February 12, 1938. We maintain an organization of some 30 people especially trained to search the records of the Railroad Commission for the purpose of supplying information and data to the public.

Beginning in 1921, we issued a list of the new drilling permits issued in the State of Texas, a service which we have maintained continuously since that time. For the first six

years I tabulated these data personally and became familiar, therefore, with the spacing in every field in the State of Texas producing at that time, among which was the Hull Field in Liberty County, Texas.

In 1937, we began the publication of the conservation rules of the Texas Railroad Commission, included in which publication are all of the general rules for operating the oil fields of Texas, as well as all of the special rules for those fields including spacing rules, allocation formulae, unit rules and all other rules.

Each month since October, 1937, these rules have been revised and whenever new rules were added, we have included them in the publication and whenever old rules were amended, such amendments have been inserted in this publication.

All of such additions and amendments described above have been made under my direct supervision and in many cases I made such additions and revisions personally.

I am familiar with the first rules issued by the Commission in 1919, which formed the basis of the rules in the publication described above. I have also inspected all of the orders on the Hull Field, Liberty County, Texas, promulgated since 1919, and find that no order has been issued providing separate or special rules for this particular field. Therefore, the Statewide Rules of the Texas Railroad Commission control the drilling and operation of wells in the Hull Field, Liberty County, Texas.

On December 29, 1954, the Railroad Commission of Texas classified the Hull Field, Liberty County, Texas, as a "piercement type salt dome".

The Railroad Commission of Texas has recognized that the producing strata in salt dome fields are so irregular that any spacing regulation is impractical and may result in physical waste. This waste arises from the possibility that even moving a well a short distance may result in missing the producing reservoir completely. I have appeared and testified before the Railroad Commission in many cases of this kind, including cases involving wells in the Hull Field, Liberty County, Texas.

No other special field rules apply to the Hull Field, Liberty County, Texas, and, therefore, there is no special proration unit rule or allocation formula, and the allowables are on a per well basis, which has been the basis of allocation in this field since proration was instituted.

R. W. BYRAM & COMPANY
By R. W. BYRAM
R. W. Byram, President

Before me this day personally appeared R. W. Byram, known to me to be a credible person, who did depose and say that the statements contained above are true and correct to the best of his knowledge and belief. This third day of April, 1961.

VALERIE D. McDONALD
Notary Public in and for Travis County, Texas

## RAILROAD COMMISSION OF TEXAS

STATE OF TEXAS
COUNTY OF TRAVIS

I, O. D. HYNDMAN, Secretary of the Railroad Commission of Texas, do hereby certify that

> On December 29, 1954 and continuously thereafter the Hull Field of Liberty County, Texas has been classified by the Railroad Commission of Texas as a "piercement type" salt dome oil field in which field the Commission makes no limitation on the distances wells may be drilled from lease lines or from each other.
>
> On December 30, 1954, John W. Mecom, Trustee, filed with the Commission application to drill Ellen D. Bay No. 1 well on a .774 acre tract in the Hull piercement type salt dome oil field, and subsequent reports show that said well has been continuously listed in the Hull Field on a .774 acre tract.

and I further certify that I am the legal custodian of the records, files and seal of the Railroad Commission of Texas.

GIVEN under my hand and seal of the Railroad Commission of Texas, this the 13th day of December, 1960.

O. D. HYNDMAN
O. D. Hyndman, Secretary
Railroad Commission of Texas

(Seal)

SUN OIL COMPANY
Gulf Coast Division
San Jacinto Building
Beaumont, Texas

September 24, 1956

TO ALL PERSONS CREDITED WITH AN INTEREST ON SUN OIL COMPANY'S DIVISION ORDER NO. 4144 COVERING JOHN W. MECOM, TRUSTEE, ELLEN BAY ET AL UNIT, LOCATED IN THE HULL FIELD, LIBERTY COUNTY, TEXAS:

Enclosed herewith are copies of our Division Order No. 4144 which credits you with an interest in the production from the aforementioned property.

Please execute one copy of this division order on Page 3, having your signature witnessed. In cases where an interest is credited to a married woman, it will also be necessary that her husband join her in the execution of this division order, having his signature witnessed. Please return one executed copy of this division order to this office in the enclosed self-addressed stamped envelope.

For your information, there has been asserted an active adverse claim to a 1/10th interest under all of the land covered by this division order. It will be necessary that Sun Oil Company withhold 1/10th of all the proceeds accrued to each royalty interest and overriding royalty interest credited on our division order, until such time as disposition has been made of said adverse claim by agreement or otherwise.

Yours very truly,

SUN OIL COMPANY

/s/ WAYNE FARQUE
Wayne Farque

WF:ms
Encls.

## DIVISION ORDER

No. 4144 Account No. 105449

To SUN OIL COMPANY,
BEAUMONT, TEXAS.

Effective 7 A.M. DATE OF FIRST RUN, 19

The undersigned certify and guarantee that they are the owners of the oil, including royalty interest payable under the terms of the hereinafter described mineral lease agreement, produced from well No. 1 and up, on the JOHN W. MECOM, TRUSTEE — ELLEN BAY ET AL UNIT tract in HULL Field, in LIBERTY COUNTY, TEXAS as follows:

More particularly described in a Unit Designation dated December 29, 1954, executed by John W. Mecom, Trustee, recorded in Volume 414, Page 220, Deed Records of Liberty County, Texas.

Until further notice you are authorized to receive oil therefrom under said lease, giving credit as follows:

| Credit to | Division of Interest | Post Office Address |
|---|---|---|
| WORKING INTEREST | | |
| John W. Mecom, Trustee | .281047 WI | 1100 Houston Club Building, Houston, Texas |
| Carnes W. Weaver | .088492 WI | 326 Gulf Building, Houston 2, Texas |
| Freeport Sulphur Company | .281047 WI | P. O. Box 1520, New Orleans 5, Louisiana |

| Credit to | Division of Interest | Post Office Address |
|---|---|---|
| **WORKING INTEREST** | | |
| Charles B. Wrightsman | .004567 ORI | P. O. Box. 256, Houston 1, Texas |
| Overton B. Banks | .002433 ORI | 1027 San Jacinto Building, Houston 2, Texas |
| W. F. Hooks | .002433 ORI | P. O. Box 153, Daisetta, Texas |
| W. C. Ikins | .000969 ORI | 326 Gulf Building, Houston 2, Texas |
| Ralph B. Lee | .000655 ORI | 375 San Jacinto Building, Houston 2, Texas |
| H. Kirby | .000655 ORI | |
| R. K. Wilson, Jr. | .000655 ORI | 1013 Peoples Nat'l Bank Bldg., Tyler, Texas |
| J. F. Horkan, Jr. | .006404 ORI | P. O. Box 2744, Beaumont, Texas |
| Laurena McMurtray | .005518 ORI | |
| Jeff Cochran | .005518 ORI | |
| **ROYALTY INTEREST** | | |
| Ellen Dowden Bay | .004866 RI | Hull, Texas |
| Joseph A. Chesnutt | .001964 RI | |

| Credit to | Division of Interest | Post Office Address |
|---|---|---|
| **ROYALTY INTEREST** | | |
| Anne Jean Chesnutt and Gail B. Chesnutt | .006570 RI | |
| William Gilbert Shivers and Margarette Shivers | .013660 RI | Hull, Texas |
| J. O. White and Burl White | .002277 RI | |
| H. V. Watson and Alene Watson | .002277 RI | Hull, Texas |
| Laurena McMurtray | .002759 RI | |
| Jeff Cochran | .004138 RI | |
| H. L. Steele | .001380 RI | |
| Doris Helen Steele Stratton | .001380 RI | |
| Thomas E. Levi | .003219 RI | 117 ½ Fourth Street Bismark, North Dakota |
| Minnie Lee Allen Campbell and Hull State Bank, jointly | .018248 RI | Hull, Texas |
| Arthur J. McGuire | .006182 RI | 2232 Centennial, Liberty, Texas |
| L. L. Hart and Sallie Hart | .008690 RI | Hull, Texas |

| Credit to | Division of Interest | Post Office Address |
|---|---|---|
| **ROYALTY INTEREST** | | |
| William Gilbert Shivers, Individually and as Independent Executor of the Estate of M. P. Bingham, deceased, Mrs. Willer Bingham and Margarette Shivers | .004432 RI | Hull, Texas |
| Mrs. F. J. Toups | .000295 RI | |
| Dick Hill, Jack Hill and R. P. Hill, Jr., jointly | .003319 RI | Hull, Texas |
| Mrs. R. P. Hill, Sr. | .001660 RI | Hull, Texas |
| Douglas Emanuel and Earline Emanuel | .000596 RI | Hull, Texas |
| G. C. Miller and Clara Miller | .000795 RI | P. O. Box 208, Anderson, California |
| H. L. McGuire | .000099 RI | P. O. Box 788, Liberty, Texas |
| Missouri Pacific Railroad Company, Successor in Interest to Guy A. Thompson, Trustee | .013699 RI | c/o A. V. Mims, Asst-Treasurer, Palestine, Texas |
| J. C. Bevers and Marie Bevers Selkirk, Trustees | .002016 RI | 1904 Lakeview Drive, Baytown, Texas |

| Credit to | Division of Interest | Post Office Address |
|---|---|---|
| | ROYALTY INTEREST | |
| SUSPENSE (Lot 6, Block 2, Chesnutt Addition, Hull Townsite) | .005353 WI, ORI, & RI | |
| SUSPENSE (Lots 1 & 2, Block 1; Lots 24, 25, 26, & 27, Block 5; Lots 31 & 32, Block 7; and Lots 10, 11 & 12, Block 11, Chesnutt Addition, Hull Townsite) | .081613 WI, ORI, & RI | |
| SUSPENSE (The Whitaker and Soulant Residue Tract) | .052485 WI, ORI, & RI | |
| SUSPENSE (Residue strip made up of 2 separate tracts, lying between the East line of the Miller 20 acres and the West line of Hull Townsite and including a portion of the West 1/2 of a 45 foot road called West Street) | .075635 WI, ORI, & RI | |

The following covenants are also parts of this division order, and shall be binding on the undersigned, their successors and assigns:

1. Quantities are to be computed from regularly compiled tank tables, the oil owner having the privilege of witnessing gauge tickets, and, in addition to the deductions of the tank tables, corrections shall be made for temperature and impurities according to your local rules in force at the time, and oil shall be steamed or treated when necessary to render it merchantable.

2. Each undersigned hereby warrants and guarantees the title to the oil credited to such undersigned owner according to the division of interest hereinabove indicated, as well as all interest hereafter acquired, and agrees to furnish abstract of title, and in case of any adverse claim of title to such oil, or any part thereof, or to the land from which such oil is produced, to furnish Sun Oil Company a satisfactory surety company indemnity bond against any such adverse claim or claims, and authorizes Sun Oil Company to retain the purchase price, without interest, until such bond shall be furnished or until dispute as to the ownership is settled, and each undersigned agrees to indemnify and hold Sun Oil Company harmless from all loss or damages that it may suffer because of receiving oil from him hereunder.

3. Runs to Sun Pipe Line Company and/or other designated receiving agency authorized by you, for your account, shall be valid delivery, and said pipe line company and/or other designated receiving agency, in your place and stead, may measure and grade the oil and make aforesaid deductions and corrections.

4. Oil run hereunder shall become your property when delivered to said pipe line company and/or other designated agency authorized by you, and shall be paid for to the respective owners according to the division of interest hereinabove indicated at Sun Oil Company's posted price per barrel on the day of such delivery, for the same kind and quality of oil produced in the same field; payment to be made on or before the 20th day of each calendar month for oil run during the preceding calendar month by check of Sun Oil Company mailed to the respective parties at the addresses given above. If, as and when Sun Oil Company may run and sell from the said wells currently as produced the royalty oil along with its own oil therefrom to another purchaser, Sun Oil Company shall pay for the oil run hereunder the price paid by such purchaser whether or not this price is more or less than the price posted by Sun Oil Company.

5. You are not expected to receive oil in definite quantities or for fixed periods except as and when you shall otherwise agree in writing, nor to provide storage on the credit balance plan, or otherwise.

6. Sun Oil Company is hereby authorized, at its election, to withhold from the proceeds accruing hereunder to any undersigned the amount of any severance, production, occupation, or other tax, levied by or under authority of the laws of the state in which the oil is produced or of the United States against him for and on account of his interest in said oil, land or lease, and to pay such tax or taxes with the withheld proceeds. All parties hereto connected with the operation of the said lease severally warrant that said oil has not been and will not be produced or otherwise handled in violation of the Federal Fair

Labor Standards Act of 1938 and has been produced and will be produced in accordance with the conservation laws of the state in which the oil is produced and the conservation rules and regulations of any governmental body or agency now having, or that may hereafter have, jurisdiction.

7. If this division order contains any provision or provisions calling for the payment out of any part of the proceeds of the oil purchased hereunder of any sum or sums limited to a definite amount or amounts, it is understood that the distribution and application of such proceeds by Sun Oil Company for the benefit of the parties concerned is purely for the accommodation of such parties and that the Sun Oil Company assumes no responsibility for errors resulting in over or under payment, or a wrong payment, of such sum or sums, and it may without liability continue payments unless and until it has been furnished with written notice, at its Beaumont Office, to desist by any parties concerned.

8. You will not be responsible for any change of ownership in the absence of actual notice and satisfactory proof thereof, and any transfer, assignment or conveyance of any interest hereunder shall be made subject to this division order and effective at 7:00 o'clock a. m. on the first day of the calendar month following said notice to Sun Oil Company. This division order shall become valid and binding on each and every owner above named as soon as signed by him or her regardless of whether or not any other of the above named owners have so signed.

WITNESSES:

. . . . . .

. . . . . .

NOS. 16695-A, 16695 and 16697

IN THE DISTRICT COURT OF
LIBERTY COUNTY, TEXAS

ELLEN D. BAY, ET AL

VS.

JOHN W. MECOM, ET AL

Amended Interpleader of the
Defendant, Sun Oil Company

Comes now Sun Oil Company, named as one of the defendants in the above causes, and files this its amended bill of interpleader and shows unto the Court the following:

1.

Defendant is informed and believes that the parties hereinafter set forth have or claim to have some interest in and to the properties involved and the funds which defendant is paying into the registry of the court, and all of the parties hereinfater set forth should be brought before this Court to assert their claims in order that final judgment may be entered herein. Some of the parties have heretofore appeared and answered through attorneys as indicated and other parties have answered in their own behalf, as follows:

| PARTIES | ATTORNEYS |
|---|---|
| 1. J. F. Horkan, Jr. | Rois Brockman, Woodville, Texas. |

| PARTIES | ATTORNEYS |
|---|---|
| 2. Missouri-Pacific Railway Co. | Arterbury, Hoover & Graham<br>1828 Bank of the Southwest Building<br>Houston 2, Texas |
| 3. Carnes Weaver | Vinson, Elkins, Weems & Searles<br>By Tarlton Morrow<br>1130 Esperson Building,<br>Houston 2, Texas |
| 4. Charles B. Wrightsman | Fouts, Moore, Williams & Caldwell<br>Gulf Building, Houston, Texas |
| 5. Hull State Bank | C. R. Wilson, Liberty, Texas |
| 6. Minnie Lee Allen Campbell, Hull, Texas | Self |
| 7a. L. L. Hart<br>b. Sally Hart, individually and as executrix of the Estate of L. L. Hart, deceased | |
| 7c. William Gilbert Shivers, individually and as independent executor of the Estate of M. P. Bingham<br>d. Mrs. Willer Bingham<br>e. Margarette Shivers | Cain, Richardson & Taylor by R. A. Richardson, Box 486, Liberty, Texas, also, appearance by selves |

| PARTIES | ATTORNEYS |
|---|---|
| 8a. John W. Mecom, individually<br>b. John W. Mecom, Trustee for Freeport Sulphur Company<br>c. Carnes Weaver | Fouts, Moore, Williams & Caldwell<br>Gulf Building, Houston, Texas<br>C. B. Cain, Liberty, Texas |
| 9. W. C. Ikins | Lewis C. Holder, Texas National Bank Building, Houston, Texas |
| 10a. Lucy Hill (Mrs. R. P. Hill, Sr.)<br>b. Dick Hill<br>c. Jack Hill<br>d. R. P. Hill, Jr. | Answer filed by Lucy Hill, Hull, Texas, for all these parties |
| 11a. Ralph B. Lee<br>b. R. K. Wilson, Jr. | Lee & Coulson by Fred Abbey, 847 San Jacinto Building Houston 2, Texas |
| 12a. Anne Jean Chesnutt<br>b. Gail B. Chesnutt | Sherman & Blaschke by Harold B. Blaschke, Bank of the Southwest Building, Houston 2, Texas |
| 13a. J. C. Bevers, Trustee | Reid, Strickland, Gillette & Ramsey by William B. Ramsey, P. D. Box 809, Baytown, Texas |
| 14a. Overton Banks<br>b. W. F. Hooks | Overton B. Banks<br>762 San Jacinto Building, Houston 2, Texas |

| PARTIES | ATTORNEYS |
|---|---|
| 15. H. Kirby | Murph Wilson<br>610 Peoples National Bank<br>Building, Tyler, Texas |
| 16a. Jeff Cochran<br>b. Laurena McMurtary | Jeff Cochran<br>Cleveland, Texas |
| 17. National Bank of Commerce | Lidell, Austin, Dawson & Sapp<br>by Charles R. Vickery, Jr.<br>Gulf Building, Houston, Texas |
| 18. Bank of the Southwest National Association | Fulbright, Crooker, Freeman, Bates & Jaworski<br>by John M. Jamison,<br>Bank of the Southwest Bldg.<br>Houston, Texas |
| 19a. Milby B. Chesnutt<br>b. Chlorita Swingford<br>c. S. T. Swingford | W. L. Hood<br>P. O. Box 2511<br>Houston, Texas |
| 20a. Lindsey Walker<br>b. Eugene Lefler | Lefler, Walker and Lefler<br>Bowie Building, Beaumont, Texas |
| 21. The First City National Bank of Houston | Fouts, Moore, Williams & Caldwell<br>Gulf Building, Houston, Texas |
| 22. E. P. Buddie | Jeff Cochran<br>Cleveland, Texas |
| 23. Boatmen's National Bank of St. Louis, Missouri | Arterbury, Hoover & Graham<br>By Howard Hoover, 1828<br>Bank of the Southwest Bldg.,<br>Houston, Texas |

| PARTIES | ATTORNEYS |
|---|---|
| 24. R. P. Hereford | Lefler, Walker & Lefler<br>Bowie Building,<br>Beaumont, Texas |
| 25. L. E. Montague | W. C. Ross, Jr., 10th Floor<br>Petroleum Building,<br>Beaumont, Texas |
| 26. Fred Colby | W. C. Ross, Jr., 10th Floor<br>Petroleum Building,<br>Beaumont, Texas |
| 27a. H. L. Steele<br>b. Doris Helen Steele Stratton<br>c. Pearl Chesnutt McCoy<br>d. Asa B. McCoy<br>e. Emma Lee Chesnutt<br>f. R. E. Daniel<br>g. All unknown heirs, successors, etc. of the above named persons<br>h. All other persons, firms, corporations, etc. who own or claim any interest in the minerals under said tract | Cited by publication—W. G. Woods, Jr., Liberty, Texas, appointed by the Court as attorney ad litem for these claimants |
| 28. Sinclair Oil & Gas Company | Burton W. Morris,<br>1613 Petroleum Building,<br>Houston, Texas |

| PARTIES | ATTORNEYS |
|---|---|
| 29. Ellen D. Bay | Overton B. Banks, 762 San Jacinto Building, Houston 2, Texas |
| 30. Burl White Box 104, Hull, Texas | Self |
| 31a. H. B. Watson<br>b. Allene Watson Daisetta, Liberty County, Texas | Answer by selves |
| 32. General Finance Company | Moore & Moore by Ray Moore Wilson Building, Beaumont, Texas |
| 33a. Ralph G. Lee<br>b. R. K. Wilson, Jr. | Ralph B. Lee, Attorney, by Dan Kennerly, 1947 West Gray Houston 19, Texas |
| 34. Tennessee Gas Transmission Company | W. L. Hood, P. O. Box 2511 Houston, Texas, and Bradford Pickett, Liberty, Texas |

Those parties hereinafter listed have not appeared in person or through attorneys and are not already before the Court, and citation should be issued and served on each of the following:

| PARTIES | ADDRESS |
|---|---|
| 1. J. O. White | Box 104, Hull, Liberty County, Texas |
| 2. Thomas E. Levi | 117½ Fourth Street, Box 1237, Bismark, North Dakota |
| 3. Arthur J. McGuire | 2232 Centenial, Liberty, Liberty County, Texas |
| 4. Mrs. F. J. Toups | Orange County, Texas |
| 5. Douglas Emanuel and Erline Emanuel | Hull, Liberty County, Texas |
| 6. G. C. Miller and Clara Miller | Box 208, Anderson, Shasta County, California |
| 7. Westex Charitable Corporation | c/o Fort Worth National Bank Mr. John Richards, Vice President, Fort Worth, Tarrant County, Texas |
| 8. L. D. Roberts | 3904 Roseneath, Houston, Harris County, Texas |
| 9. Lee E. Loeffler | Office of Charles B. Wrightsman, Bank of the Southwest Building, Houston, Harris County, Texas |
| 10. R. E. Daniel | Bank of the Southwest Building, Houston, Harris County, Texas |

| PARTIES | ADDRESS |
|---|---|
| 11. Pearl Chesnutt McCoy and husband, Asa McCoy | 116 Katherine Courts, San Antonio, Bexar County, Texas |
| 12. W. E. Teel and Mary Teel | Box 233, Hull, Liberty County, Texas |
| 13. Graridge Corporation | Breckenridge, Stephens County, Texas |
| 14. Fort Worth National Bank | Fort Worth, Tarrant County, Texas |
| 15. Willie Oneida Montagne Brassel and husband, R. W. Brassel | Palo Pinto County, Texas |
| 16. Emma Lee Chesnutt | Apt. 4, 811 Calhoun Street, Houston, Harris County, Texas |
| 17. H. L. Steele | Daisetta, Liberty County, Texas |
| 18. Doris Helen Steele Stratton | Liberty County, Texas |

Certain parties, to-wit, J. F. Horkan, H. L. McGuire and Jeff Cochran, having or claiming an interest herein, are dead and the representatives of their respective estates are hereinafter set forth to serve with citation, being the following:

| PARTIES | ADDRESS |
|---|---|
| 1. Vera McCafferty Marks Horkan, Executrix and sole devisee of J. F. Horkan, deceased | 4717 Estate Drive Beaumont, Jefferson County, Texas |
| 2. Harry Lloyd McGuire, Independent Executor and Trustee of the Estate of H. L. McGuire, deceased | Liberty, Liberty County, Texas |
| 3. Marguerite Hubier Cochran, Independent Executrix of the Estate of Jeff Cochran, deceased | Cleveland, Liberty County, Texas |

2.

Sun Oil Company was and is a mere purchaser of oil from the properties involved in said causes after such oil had been produced, severed and become personal property. Based upon title opinions received by Sun Oil Company and the matters shown of record, Division Order 4144 was prepared and circulated in order that defendant might make payment of the proportionate interest to each of the owners shown by its title opinions. Thereafter, before all interested parties executed said division order, the said Ellen D. Bay instituted Suit No. 16695 in the District Court of Liberty County, Texas, against John

W. Mecom, John W. Mecom, Trustee, Overton B. Banks and Sun Oil Company, and others. Reference is here made to the pleadings in said suit for a more detailed description of the issues therein involved. There was also instituted in the District Court of Liberty County, Texas, Suit No. 16697 by Overton B. Banks and W. P. Hooks, plaintiffs, against John W. Mecom, Mecom Trust, and John W. Mecom, Trustee, and others, including Sun Oil Company, defendants, reference to which is hereby made for a more complete description of the nature of said suit. Said causes were thereafter consolidated.

3.

Your defendant, Sun Oil Company, being a mere stakeholder and having no interest in the controversy other than to pay the funds becoming due from the purchase of oil to the parties legally entitled to receive the same, filed its interpleader tendering and offering to make payment of all such funds and asserting therein its claim for attorneys' fee and costs out of the funds so tendered.

4.

This Court, recognizing defendant's position as a stakeholder as set forth in its interpleader action, by order dated July 21, 1961, severed said actions as against Sun Oil Company and ordered that proceedings against Sun Oil Company be stayed until the main actions were determined "and the rights of the parties and their respective interests and claims to said funds determined."

5.

Notwithstanding the order of this Court severing said actions against this defendant and ordering that proceed-

ings against defendant be stayed until the main actions were determined, various pleadings, claims and assertions have continued to be made and filed against Sun Oil Company. In the proceedings Nos. 16695 and 16695-A, Overton B. Banks and W. F. Hooks, referring to themselves as cross-plaintiffs, filed motion for summary judgment seeking judgment against Sun Oil Company for their claimed interest in the funds, as well as attorneys' fees. In proceeding 16695-A, which was the severed action against Sun Oil Company and in which this Court had heretofore ordered that all proceedings be stayed, the said Ellen D. Bay through Overton B. Banks, attorney, filed what was entitled "Original Petition of Ellen D. Bay" against Sun Oil Company and obtained service of citation therein, thereby requiring that defendant appear and file answer in such proceeding, which it has done. Such suit remains on file and has not yet been determined by this Court.

6.

From April 8, 1955, through August of 1962, during the time your defendant was purchasing oil from the properties involved in the proceedings above described, the net value of the oil purchased by defendant amounted to the sum of $288,637.80, out of which, pursuant to the Court's order and direction as set forth in the Court's judgment dated June 1, 1960, in proceedings Nos. 16695 and 16695-A, styled Ellen D. Bay v. John W. Mecom, et al, defendant has paid and Ellen D. Bay has received and accepted the sum of $1,400.34, and an additional check for $4.19 has been mailed to her, and there is therefore remaining the sum of $287,233.27, which defendant here and now pays into the registry of the court there to abide the final judgment of the Court. Your defendant further says that should it purchase any oil in the future from the

properties here involved, that the sums due thereon will be duly paid into the registry of the court and this defendant here and now tenders and offers to make payment of all sums becoming due in the future.

7.

Your defendant shows unto the Court that since the various parties have made conflicting claims respecting their interest in and to such funds, that defendant cannot determine the status of said claimants and the amount to which each is legally entitled without incurring the risk of a double recovery against it should it determine for itself the proper party to whom such money should be paid or the amount to be paid to each claimant. Your defendant is not a party to the dispute between said parties and is in nowise responsible for such dispute. It has purchased said oil in the usual and ordinary course of business. When such conflicting claims arose and said suits were instituted it impounded and held such funds, tendering and offering to pay the same subject to the orders of this Court, which sums defendant was and has been at all times ready and willing to pay to the parties legally entitled to receive the same.

8.

By reason of the filing and pendency of such suits and the continued filing of pleadings and additional suits therein, even after the order of this Court severing the claims against defendant and ordering that the proceedings against this defendant be stayed, defendant has incurred expense in the employment of attorneys to file answers and to represent its interests. Some of the parties have failed to agree that defendant was a mere stakeholder, but

on the contrary, even in the face of the Court's orders, have continued to actively assert and prosecute claims against defendant, requiring defendant's attorneys to continue to participate in said litigation and to prepare and file answers to such continued claims, by reason of which defendant is entitled to recover a reasonable attorneys' fee for the services rendered and to be rendered, to-wit, the sum of Fifteen Thousand Dollars ($15,000) or such amount as may be fixed and determined by the Court. Such attorneys' fee should be awarded to this defendant, Sun Oil Company, out of the funds which it has admitted are due and owing and which it has paid into the registry of the court subject to the orders of the Court.

9.

Defendant further shows unto the Court that all parties herein named, who have not otherwise heretofore appeared and answered should be cited to appear and answer herein, *and that upon trial hereof the Court should determine the rights and interests of all of the respective claimants and enter its final order determining and adjudicating their rights and their interests in and to the funds which defendant has paid into this court, as well as to funds which will accrue in the future, and to enter its order discharging defendant, Sun Oil Company, of any and all liability and absolving it from further liability.*

WHEREFORE, Sun Oil Company, named as a defendant herein, and also as a cross-defendant, moves and prays the Court that all parties be cited to appear and answer this bill of interpleader and that upon trial hereof the Court (1) enter its decree fully and finally discharging defendant, Sun Oil Company, of all liability; (2) that the Court enter its judgment allowing defendant reasonable

attorneys' fee in the sum of Fifteen Thousand Dollars ($15,000) to be paid by the Clerk out of the funds herein deposited into court; (3) that the Court order that all costs be paid out of such funds; (4) *that the Court enter its decree fixing and determining the rights and interests of all of the resepective claimants and finally adjudicating and determining their interests in and to the funds paid into this court, as well as their interest in funds which might accrue in the future, and directing the Clerk to make payment to the parties legally entitled to receive the same of the amount of their interests after deducting attorneys' fee and costs; (5) and for such other and further relief as defendant may show itself justly entitled to receive.*

J. L. LYBRAND
Petroleum Building
Beaumont, Texas

ORGAIN, BELL & TUCKER
First Federal Savings Building
Beaumont, Texas

BY /s/ John G. Tucker
Of Counsel
Attorneys for Sun Oil Company

THE STATE OF TEXAS
COUNTY OF JEFFERSON

John G. Tucker, being duly sworn, upon oath states that he is attorney of record for the defendant, Sun Oil Company, in the above styled and numbered causes and authorized to make and present the foregoing interpleader, which he does under said authority, and being cognizant of the facts therein set forth, says that the same are true and correct.

/s/ John G. Tucker

SWORN TO AND SUBSCRIBED before me, the undersigned authority, by John G. Tucker, this 8th day of October, A.D. 1962.

/s/ Doris F. Greeves
Notary Public in and for
Jefferson County, Texas

(SEAL)

## THE STATE OF TEXAS
## COMPTROLLER'S DEPARTMENT

I, Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, do hereby certify that the attached statements setting out volumes and values of gas sold and volumes and values of gas used, off leases and/or units located in Liberty County, Texas, are true and correct statements as reported to this office on monthly Gas Producer's Reports, by the producers listed, for the period of time specified, as follows:

| Operator, Lease & Period | Gas Sold MCF | Gas Sold Value | Exempt MCF | Exempt Value | Gas Used MCF | Gas Used Value |
|---|---|---|---|---|---|---|
| John W. Mecom, Trustee Ellen Bay 12/1955 - 7/1960 | | | | | 33,169 | $2,164.10 |
| Sinclair Oil & Gas Co. Ellen Bay Unit 10/1959 - 7/1961 | 337,944 | $20,276.64 | | | 59 | 3.54 |
| Graridge Corp. Ellen Bay Unit 3/1961 - 4/1965 | 173,878 | $10,348.62 | 24,042 | $1,205.28 | 5,876 | 352.56 |
| Petroleum Corp. of Texas Ellen Bay Unit 5/1965 - 8/1965 | —0— | —0— | | | | |

Given under my hand and seal of office at Austin, Texas, this 15th day of June 1967

/s/ Robert S. Calvert
STATE COMPTROLLER OF PUBLIC ACCOUNTS

(SEAL)

## THE STATE OF TEXAS

## COMPTROLLER'S DEPARTMENT

I, Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, do hereby certify that the attached statements setting out production, runs and value of runs of oil from leases and/or units located in Liberty County, Texas, are true and correct statements as reported to this office on monthly Crude Oil Producer's Reports, by the producers listed, for the period of time specified, as follows:

| Operator, Lease Name and Period Covered | Production Barrels | Runs Barrels | Value |
|---|---|---|---|
| John W. Mecom, Trustee<br>Ellen Bay, et al Lease<br>April 1955, through June 1960 | 86,276.00 | 85,601.00 | $268,906.85 |
| Sinclair Oil & Gas Company<br>Bay Ellen Unit<br>July 1960, through February 1961 | 3,766.70 | 3,701.21 | 12,398.99 |
| Graridge Corporation<br>Ellen Bay Unit<br>March 1961, through April 1965 | 6,413.00 | 5,952.00 | 19,864.68 |
| Petroleum Corporation of Texas<br>Ellen Bay Unit<br>May 1965, through December 1965 | —0— | 303.00 | 940.79 |

Given under my hand and seal of office at Austin, Texas, this 15th day of June 1967

/s/ Robert S. Calvert
STATE COMPTROLLER OF PUBLIC ACCOUNTS

(SEAL)

## APPENDIX C

## OBSERVATIONS OF A TEXAS OIL MAN

By: Overton B. Banks

1. *ON OIL*: During World War II, German submarines sank many of our tankers carrying oil from Gulf Coast ports to the Atlantic Seaboard. A shortage of oil developed on the East Coast and an oil pipe line was rushed to completion from Texas to the East to supply the vital oil needed for our war efforts. Thus was demonstrated to the American people the danger to our welfare of depending upon interruptible overseas shipments of oil in time of war emergency. Luckily the oil necessary for our war effort was on tap and ready for use in domestic fields. Our enemies could not begin to match us in oil supplies and as has been truly observed "the United States floated to victory in two world wars on a sea of oil."

Since the war, vast reserves of oil have been discovered in the Middle East, Russia and North Africa, reserves so vast that they aggregate several times the combined known reserves of the United States and Canada. These huge oil supplies are much closer to our potential enemies than they are to us, and, if and when World War III breaks out the oil supply situation could very well be reversed and we could be "sunk" in a sea of foreign oil.

The President's order limiting exports of foreign oil has spotlighted the importance to our national welfare of maintaining a sound domestic oil producing industry. Oil is just as important to our war potential as the army, navy and air force, because without oil supplies our armed forces are helpless.

The argument has been seriously advanced that we should use the cheap foreign oil and save our oil for the future; however, oil reserves are discovered, developed and produced by experts over many years, by drilling of many wells, and we simply would not have time during an emergency to train the personnel necessary to drill the thousands of wells required to find and produce the oil. Then too, once found, oil cannot be rapidly produced without causing excessive waste. Usually many years are required to develop and produce an oil field so as to obtain maximum recoveries.

2. *FUTURE OIL AND GAS RESERVES*: Geologists tell us there is plenty of undiscovered oil and gas in the United States, and that discoveries will be in direct proportion to the number of wells drilled. Adequate reserves of domestic oil can only be maintained by drilling and such drilling can be accomplished, either by providing the necessary profit incentive for private capital or by the direct entry of the government into the oil finding business. Government oil finding businesses are notoriously ineffective and inefficient so that we arrive at the inescapable conclusion that the only way to maintain our domestic reserves of oil is to provide and maintain over the years an adequate profit incentive for private capital. During recent years, drilling has declined in the United States because of a decline in profit incentive resulting from (1) importation of cheap foreign oil, (2) rising costs, and (3) inadequate prices, and because of the importance to our national welfare of uninterruptible supplies of oil, the writer believes that our people are aware of the situation and will insist upon necessary profit incentive, to encourage domestic drilling.

The demagogues who are attacking the domestic oil industry as tax give-aways would only be fair to their constituents and their country, if they would inform themselves of the true situation, and consider statistics available to all which show that oil wells are drilled by investors who are willing to take the risk of total loss involved in the drilling of a well, because of the profit incentive from possibility of a rich strike and because drilling costs and 27½% of oil income (depletion allowance) may be deducted from their gross income for income tax purposes. The fact that our domestic drilling is declining is a clear indication that the present profit incentive is inadequate to encourage the number of wells necessary to maintain our reserveese.

The present profit incentives for drilling favor the individual in the high income tax bracket. He can deduct from his income all sums spent on intangible drilling costs which amount to 100% of the cost of a dry hole and upwards of 75% of the cost of a producing oil well. In addition, if he has oil or gas income, he is entitled to a depletion allowance of 27½%. If he backs a successful oil operator, his excess tax dollars are converted into reserves of oil and gas in the ground. The present profit incentive for drilling does not favor a tax payer in the low income brackets.

3 *NATURAL GAS*: During the 1930's with the perfection of geophysical prospecting in the United States, numerous oil and gas structures, particularly in Texas and Louisiana were discovered. Subsequent drilling proved the structures and enormous quantities of natural gas were discovered along with tremendous reserves of oil. The natural gas act passed by Congress in 1935 placed the

jurisdiction of interstate gas pipe lines in the Federal Power Commission (FPC). This act directed the FPC to regulate rates of pipe line companies so as to permit a fair return on invested capital, and in addition to prevent undue competition among the pipe line companies for markets. Pipe lines could only be built when approved by FPC after proof of the existence of a market and adequate gas reserves. After the second World War, the enormous profit potential of natural gas became evident. Here in the Southwest were vast reserves of gas which could be bought for a few cents per Mcf, transported to the population centers and sold for many times cost. Investment organizations considered natural gas so safe an investment that a projected gas line with 20 years reserve in sight and certificate from the FPC, could be financed to a large extent by low interest bearing bonds, and the common stocks with high leverage possibilities found a ready market. Profits to the gas lines were assured, all they had to do was tie up gas reserves which were eagerly offered by desperate oil operators willing to make long-term low price commitments in order to realize some return from their gas and in addition, to recover and sell liquid hydrocarbons produced with the gas, and which had approximately the same value per barrel as oil. The distant consumers were eager to buy because the gas was cheaper and more efficient and convenient to use than any other fuel. So after the war numerous gas pipe lines were constructed and the gas reserves tied up under long-term commitments. However, even in the Southwest the gas reserves are not limitless, and a number of the larger oil operators realizing the potential value of natural gas refused to sell or tie up their reserves at give-away prices. In addition, many operators fearing FPC controls of interstate natural gas as

the entering wedge in an attempt to bring the entire oil industry under federal control, refused to sell gas for out of state consumption.

The numerous cross country gas pipe lines transport enormous quantities of natural gas, and the gas reserves are being depleted at a frightening rate. The situation in 1961 is far different from that existing in 1945. At that time there was a large number of gas wells existing and shut in because of lack of markets, gas wells discovered and completed in the search for oil during the previous 20 or more years. Now, most of these reserves have been either dedicated to existing pipe lines or are strongly held. Chemical companies using natural gas as a raw material have multiplied many fold during the years after the war and provide an ever-expanding market for the producers who refuse to sell gas for interstate movement. The owners of undedicated gas reserves are being besieged by would-be buyers for chemical companies and pipe line companies, however, the prices offered are not attractive and do not provide the profit incentive necessary to maintain and increase gas reserves. The action of the FPC as directed by the Supreme Court under political pressure from large gas consuming centers in the fixing of low and inadequate field prices for natural gas can result only in empty pipe lines in the foreseeable future.

The smart owners of gas reserves are therefore quietly biding their time until the market for natural gas becomes realistic. Most of the large gas reserves presently undedicated contain liquid hydrocarbons, so that in order to keep their royalty owners satisfied and realize some income from their properties, the operators cycle the gas, that is, they produce the gas, extract the liquid hydrocarbons and pump the gas back into the reservoir sands.

When the liquids are finally removed over a period of many years, the remaining gas will be dry and should command a much higher price.

We are now entering upon a seller's market for natural gas and the beneficiaries of this market will be the owners of gas reserves, provided they are strong enough economically to wait for a favorable price.

Gas users have depended upon the oil operator to drill the wells necessary to discover gas, and with the oil industry depressed by the introduction of cheap foreign oil, drilling has declined and gas discoveries have declined. The following examples will illustrate the present economic disparity between the price for oil and the price for gas, to-wit:

1. An underground reservoir 6000 feet below the surface, when filled with dry gas worth 10¢ per Mcf will produce only 5% of the revenues which the same reservoir would produce if filled with oil worth $3 per barrel. Stated differently, the oil reservoir with recovery factor of 700 barrels per acre foot would bring $2100 per acre foot, but filled with dry gas worth 10¢ per Mcf would contain approximately 1000 Mcf worth only $100 per acre foot.
2. 6 Mcf of natural gas contains the approximate BTU content of a barrel of oil, so a consumer interested in buying BTU's could on the basis of well head prices of 10¢ per Mcf of gas and $3 per barrel of oil, buy five BTU units of gas for the price of one BTU unit of oil. No wonder consumers are eager to buy natural gas.

**PROPOSED ADDRESS BY OVERTON B. BANKS**

**TO: THE TEXAS LANDOWNERS AND INDEPENDENT OIL AND GAS PRODUCERS ASSOCIATION. IN ASSEMBLY AT THE STEPHEN F. AUSTIN HOTEL, AUSTIN, TEXAS, MARCH 14, 1961**

LADIES AND GENTLEMEN: For over 60 years since the bringing in of the famous Lucas gusher in the Spindletop Field over near Beaumont, Texas, Texans have proudly pointed to their state and to the oil men and the oil companies who have grown and prospered in the free-enterprise opportunities offered to one and all of our citizens and we have been proud of the zealous manner in which our courts and Railroad Commission have protected the property rights of even the smallest land owner and have permitted him to participate in the opportunities for prosperity and to have an oil well in his own back yard. We have developed a fine group of oil men and oil scientists, and they have gone to the remote regions of the earth and have discovered and produced oil in many foreign lands. Foreign countries do not permit their nationals to own the oil and gas underlying their separately owned tracts of land. Instead the oil and gases are owned by the governments, and are controlled by the heads of such governments. Our own state department has helped our domestic oil companies to obtain concessions in many foreign countries using your tax dollars and vast reserves of oil and gas have been found at minimum costs because there are no separately owned properties and no separate property rights to be protected.

Our major oil companies and certain large independent operators who have grown rich and powerful as a result

of the free enterprise system in Texas and the United States, and who have developed tremendous reserves of oil and gas over seas, have embarked on a propaganda campaign to destroy the very system to which many of them owe their very existence today. They seek to make our oil and gas resources available only to a privileged few. They contend that our free-enterprise system which permits the drilling and producing of wells on small tracts is undesirable and wasteful, resulting in the drilling of too many wells when they could use the money to better advantage in drilling elsewhere.

If there is any waste involved in small tract drilling and producing, it is not waste of oil and gas. Actually small tract drilling promotes conservation by the prevention of waste. One item of waste under our conservation laws is physcial waste resulting from so spacing wells as to leave substantial amounts of oil and gas in the ground. Small tract drilling has resulted in the discovery and production of many new sands or reservoirs which the majors would never have found.

Any waste involved is waste of money. Money that goes into the pockets of our drilling contractors instead of into the pockets of foreign potentates. Money that goes into the pockets of the Texas roughnecks, tool pushers and others who work for the contractors instead of into the pockets of the monopolies. Money that goes into the pockets of our Texas geologists, petroleum engineers, equipment suppliers, royalty owners and small tract operators instead of into the pockets of foreign governments.

The denial of the right of the small tract owner to drill and produce from his small tract is not conservation of oil and gas, but only conservation of money. Money

which proponents of this alien philosophy would deny the citizens of Texas. Money which rightfully under our free-enterprise system should be available to the small tract owners.

How well the propaganda campaign of the monopolists has succeeded is demonstrated by the Normanna and Port Acres cases, which our own Supreme Court has departed from a long line of cases which for over sixty years permitted the owner of a tract of land no matter how small to drill for and capture the oil and gas which will enter the bore of a well on his own land. The court now holds that an operator is entitled to recover only the oil and gas underlying his land and cannot legally drain oil and gas from his neighbor's land. This holding disregards and overlooks completely the fugacious and fluid nature of oil and gas and their tendency to move within a reservoir when placed into production.

Oil and gas accumulate underground in reservoirs or pools similar to water in a pond. If you and a number of other persons own separate parts of the surface of a large pond and you drain water from your part of the pond, can your next door neighbor say that you are draining his water. Of course not. As water is withdrawn there will be a gradual lowering of the water level of the entire pond, and the owners of the shallow edges of the pond will be the ones who are injured by loss of their water; they may or may not get their fair share.

As water or oil or gas is drained from a well in a reservoir, the fluids, oil, gas and water, start to move in accordance with reservoir forces. A well close to the water level in a reservoir may not recover much oil or gas due to the early entrance of water into the well bore.

In the case of the East Texas Field there is undoubtedly a tremendous area on the down dip or West side of the original reservoir in which a commercial well could not be made yet the oil is there and will migrate up-dip and be drained by wells strategically positioned in the reservoir. Many tracts of land in the East Texas Field have produced many times the volume of oil originally in place, which of course is easily explained by the steady migration or flow of oil and water up-dip towards the top of the structure to replace the oil produced.

The volume of oil and gas in place under any tract of land, and the land from which oil or gas is drained by any particular well under our present judicial system is an enginering problem provable in court only by testimony of expert witnesses. If the right of a small tract owner to drill and produce from his small tract is a mere equitable right then such right is dependent upon the testimony of expert witnesses and he cannot possibly win a lawsuit against a large company. If he produces one expert witness, the large company will produce ten or more, and since the Court must give weight to the preponderance of testimony, the large company will win every time.

A tremendous amount of engineering data is needed by an expert engineer who in good faith seeks to determine true reserve and drainage condition in any reservoir, and this information is not available until after the drilling of a number of wells and performance tests have been made.

Very often reservoir experts testifying on behalf of their employers and seeking to obtain the greatest advantage possible for their employer, cannot prove their statements or opinions of reserves and drainage, so that often trials are actually farcial with an expert making statements

which he knows he cannot prove, but which he also knows cannot be disproved by his opponent. The court being thoroughly confused by conflicting claims can only decide in favor of the side with the greatest political influence.

A group of Texas oil and gas men have organized to seek out an equitable solution to the small tract drilling. I say to you there is no equitable solution to this problem. Either the small tract owner has a legal right to drill and produce from his small tract, or he has no rights at all.

Equitable rights mean only that a court sitting in equity and hearing and weighing testimony of expert witnesses must determine the rights of the small tract owner, and the expense of hiring $100 or more per day geologists, petroleum engineers and attorneys means that the great majority of small tract owners no longer have any rights at all.

If the present decisions are allowed to stand and to become the common law of Texas with respect to the rights of the owners of small tracts of land, the small tract owner will no longer have a market for his lease. How many Texas students have been sent to College because papa was hard-headed enough to hold out for and get either a well or a large lease bonus for the lease on the small family homestead. Well, Ladies and Gentlemen, that source of funds no longer exists. The lease men do not care about your small tract any more, your rights are only equitable subject to dispute and their own experts can prove that you have nothing of value. The large acreage owners will get your oil and gas, but if you are sufficiently cooperative, and don't give them any trouble, they may include you in a pool on their own terms and conditions.

Ladies and Gentlemen, this gigantic swindle and disfranchisement of a large number of our small tract owner citizens, is totally foreign to our free-enterprise system and to the constitutional guaranties which each property owner is supposed to have with respect to the right to enjoy and use his own property.

There has been a gradual erosion away of the rights of royalty owners particularly with respect to pooling of tracts. We do not have compulsory unitization of separately owned tracts of land, but each land owner is privileged to consent to any pooling arrangement which will include his land. Most oil operators have a pooling clause in their leases permitting them to pool in compliance with spacing regulations or to promote conservation of oil and gas. Most lessors are told and believe that any pooling attempted by the operator will be in compliance with rules of the Railroad Commission, which is empowered by our Legislature to protect the public in matters involving conservation of oil and gas.

There has been a great deal of abuse of the pooling clause, certain operators having color of authority have in many instances attempted to pool the lands of their lessors without approval of the commission. They contend that the only obligation they owe to the Lessor is to act in good faith, and good faith is provable by the testimony of his own geologists, and if a particular landowner loses his royalty in a pooling deal which includes 90% unproductive acreage, there is nothing he can do about it.

A flagrant abuse of the pooling clause in a lease is illustrated by a case now pending in a district court. An elderly widow owned a ¾ acre tract on the flank of a piercement type salt dome under lease to a large oil op-

erator. A unit designation purporting to combine the ¾ acre tract with a number of other small tracts into a 20 acre unit was filed for record and a well was drilled and completed as an oil well on the ¾ acre tract. The area within the 20 acre unit was not all under lease to the operator, and wells drilled by other operators within the purported unit condemned as dry and non-productive all of the acreage within the purported unit except the ¾ acre belonging to the elderly widow. Nevertheless, the operator contended that he had pooled the acreage and that the Lessor was entitled to only a portion of the ⅛ royalty based on the ratio of her ¾ acre tract to the 14 acres, more or less within the purported unit under lease to the operator.

The operator contends that he filed a unit designation on the advice of his geologists and attorneys, and that he thereby in good faith formed a pooled unit for the conservation of oil and gas. The widow contends that the unit designation never became effective as a pooled unit for the conservation of oil and gas because the well has been continuously classified in a piercement type salt dome field, and prorated on a per well basis, so that in the absence of a unit rule no acreage could be assigned to the well for proration purposes, since the term unit means a proration unit. The operator denies any necessity for Railroad Commission approval of the purported unit claiming authority under the pooling clause and the court has upheld this contention.

The elderly widow and her attorneys have been put to great expense in hiring expert witnesses to prepare and present her case. Her case has been further complicated by the purchaser of oil from the well, a major oil com-

**pany, which after waiting 18 months after completion of the well proceeded to issue a Division order on the basis that a pooled unit had been formed in the salt dome field, crediting about 50 people with interests in the production, and then when sued claimed status of stakeholder entitled to interpleader relief and pleading as necessary and indispensable parties, all of the persons shown on its Division order.**

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No. 488

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

ELLEN D. BAY, ET AL., *Petitioners*

v.

JOHN W. MECOM, TRUSTEE, ET AL., *Respondents*

## PETITION FOR WRITS OF CERTIORARI To The Supreme Court Of The State Of Texas: The Beaumont, Texas Court Of Civil Appeals: The Eastland, Texas Court Of Civil Appeals: And The District Court Of Liberty County, Texas

## RESPONDENTS' BRIEF IN OPPOSITION

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*To The Honorable Supreme Court Of The United States:*

On motion for summary judgment, the District Court of Liberty County, Texas, held, on the undisputed facts of record, and as an application of Texas law hereto, that Respondents had created a valid pool for oil and gas on

land located in Liberty County, State of Texas. This Trial Court judgment was affirmed by the Eleventh Court of Civil Appeals of Texas and by the Supreme Court of Texas refusing writ of error, no reversible error.

In opposition to the grant of petition for writ of certiorari, Respondents say:

## I

## NO FEDERAL QUESTION IS PRESENTED BY THE PETITION

There was involved below nothing but application of Texas property and contract law to undisputed facts. The Respondents exercised a contractual pooling power in an oil and gas lease at which time all pooling in Texas was a matter of contract and governed only by a requirement of good faith in the exercise of the pooling power. (Vol. 5, LANGE'S TEX. PRAC., Sec. 841; *Humble Oil & Ref. Co. v. Carr*, 243 S.W.2d 709 Tex. Civ. App., Writ of error refused. No reversible error; *Tiller v. Fields*, 301 S.W.2d 185 Tex. Civ. App. No writ history). The Petitioners admitted the exercise of the pooling power was in good faith, and the Trial Court granted Respondents' motions for summary judgment. The Petitioners' only contention in the Courts of Texas has been that the pool was invalid based on the erroneous conclusion that the Railroad Commission of Texas had to ratify and approve the pool. If there is any law well settled within the State of Texas, it is to the effect that the Railroad Commission of Texas could not effect property rights and could not prohibit nor compel pooling. (Vol. 5, LANGE'S TEX. PRAC. Sec. 841; *Humble Oil & Ref. Co. v. Carr*, 243 S.W.2d 709 Tex. Civ. App., error ref'd, n.r.e.;

*Dailey v. Railroad Comm.*, 133 S.W.2d 219 Tex. Civ. App. error ref'd; *Novak v. Bruner*, 320 S.W.2d 439, Tex. Civ. App. error ref'd).

This area of law is peculiarly an area of State cognizance. (*Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 1938). We respectfully submit that the issues have been settled in this case on its own facts, under Texas law, and by those Courts which have complete authority thus to decide. (*Erie Railroad Co. v. Tompkins*, supra; *Murdock v. City of Memphis*, 20 Wall. 590, 1874; *Black v. Cutter Laboratories*, 351 U.S. 292, 1956).

## II

## NO FEDERAL QUESTION WAS RAISED IN THE STATE COURTS

In the absence of Federal constitutional issues being raised and determined below, no Federal question can be entertained here. (*Walters v. City of St. Louis*, 347 U.S. 231, 233, 1954; *Newsom v. Smith*, 365 U.S. 604, 1961; *Michel v. Louisiana*, 350 U.S. 91, 1955; *Pennsylvania Railroad Co. v. Illinois Brick Co.*, 297 U.S. 447, 1936). Petitioners' most optimistic statement as to the raising of Federal questions alleges that such questions were presented in Petitioners' Motion for Rehearing in the Supreme Court of Texas. It is settled that it is too late to raise a Federal question for the first time in a Petition for Rehearing in the highest State Court. (*Waters-Pierce Oil Co. v. Texas*, Tex. 1909, 29 S.Ct. 227, 212 U.S. 112, 53 L.Ed. 431; *McMillen v. Ferrum Min. Co.*, Colo. 1905, 25 S.Ct. 533, 197 U.S. 343, 49 L.Ed. 784; *Susquehanna Boom Co. v. West Branch Boom Co.*, Pa. 1884, 3 S.Ct. 438, 110 U.S. 57, 28 L.Ed. 69).

## III

## PETITIONERS' PETITION FOR WRIT OF CERTIORARI IS NOT TIMELY FILED

The Petition for writ of certiorari affirmatively shows that motions for rehearing on two of the opinions complained of were overruled, one on February 17, 1965, and the other on October 6, 1965. A petition for writ of certiorari from those judgments is not proper as not filed within ninety (90) days.

Respondents submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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*Attorneys for Respondents*

## CERTIFICATE OF SERVICE

A copy of this Brief in Opposition was served upon counsel of record for Petitioners, Overton B. Banks, 466 San Jacinto Bldg., Houston, Texas, 77002, and Joseph W. Cash, 600 San Jacinto Building, Houston, Texas, 77002, by depositing the same in the United States mail with air mail postage thereon, properly addressed, in compliance with Rule 33(1) of the Revised Rules of the Supreme Court of the United States.

G. KIBBY MUNSON